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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504, which restrict the printing or photographing of illustrations of United States currency and other obligations and securities of the United States, violate the First Amendment.

2. Whether 18 U.S.C. 504 is unconstitutionally vague.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following individuals were defendants in the district court and are appellants in this Court: H. Stuart Knight, Director, United States Secret Service; William French Smith, Attorney General of the United States; James R. D'Amelio, Special Agent in Charge, New York Field Office, United States Secret Service; and John P. Martin, Jr., United States Attorney for the Southern District of New York.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-33a) is reported at 539 F. Supp. 1371.

JURISDICTION

The district court had jurisdiction over this action for declaratory and injunctive relief pursuant to 28 U.S.C. 1331(a). The judgment of the district court (App. B, *infra*, 34a-35a) declaring 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 unconstitutional was entered on June 18, 1982. A notice of appeal (App. C, *infra*, 36a-37a) was filed on July 16, 1982. Justice Marshall extended the time for docketing the appeal to and including October 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 115-116 (1981).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

18 U.S.C. 474 ¶ 6 provides in pertinent part:

> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any * * * obligation or other security [of the United States] or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States [shall be guilty of a crime].

18 U.S.C. 504 provides:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
> (B) revenue stamps of the United States,
> (C) any other obligation or other security of the United States, and
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation
>
> for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncancelled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C) or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

STATEMENT

1. The Constitution expressly authorizes Congress to "coin Money [and] regulate the Value thereof" (Article I, Section 8, Clause 5) and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (Article I, Section 8, Clause 6). Pursuant to this authority, Congress enacted the two statutes at issue in this case. The first statute is 18 U.S.C. 474 ¶ 6, which broadly prohibits printing, photographing, or making any impression in the likeness of an obligation or security of the

United States. The second statute, 18 U.S.C. 504(1), creates certain exceptions to the broad prohibition in Section 474. Section 504(1) permits the printing or publishing of illustrations of United States obligations and securities "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," provided that the illustrations are in black and white and are of a size less than three-quarters or more than one-and-one-half of the genuine article, and provided further that the negatives and plates used in making the illustrations are destroyed after their final use.[1]

2. Appellee, Time, Inc., a corporation engaged in the business of publishing magazines, brought this action for declaratory and injunctive relief in the United States District Court for the Southern District of New York, challenging the constitutionality of 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 on their face and as applied.[2] Appellee alleged that on at least six occasions within the preceding decade, representatives of the Secret Service had advised appellee that particular photographic reproductions of United States currency that appeared in appellee's magazines were in violation of the color and size requirements of Section 504 (App. A, *infra*, 10a-13a). Appellee further alleged that the Secret Service had requested it to cease and desist from further violations and had warned, in November 1976, that further violations would be referred to the United States Attorney's Office "for appropriate action" (*id.* at 12a).[3] Appellee contended that Sections 474 and 504 impermissibly infringe its First Amendment right "freely and without

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[1] 18 U.S.C. 504(2) permits the use of United States obligations and securities in motion-picture films, microfilms or slides for projection on a screen and in telecasting.

[2] The complaint named as defendants certain government officials responsible for administering and enforcing the federal counterfeiting laws, including the Secretary of the Treasury, the Attorney General, the Director of the Secret Service, the United States Attorney for the Southern District of New York and the Special Agent in Charge of the Secret Service's New York Field Office.

[3] Although the Secret Service subsequently brought additional alleged violations to appellee's attention, none of these matters was formally referred to the United States Attorney's Office for prosecution.

restriction to publish and comment upon the news" (App. A, *infra*, 9a) and that Section 504 is void for vagueness.

The district court entered a declaratory judgment for appellee, holding that 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 are unconstitutional on their face and as applied to appellee (App. A, *infra*, 1a-33a; App. B, *infra*, 34a-35a).[4] The court first concluded that appellee's publication of illustrations of United States currency is protected speech because it is "intimately related to the expression and communication of ideas" and "does not entail expression which is deemed by the nature of its content to be subject to regulation in the interests of the public weal" (App. A, *infra*, 20a). Focusing on Section 474 ¶ 6, the court ruled that, although "[t]he government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's currency system" (App. A, *infra*, 26a), the comprehensive ban on reproducing likenesses of United States currency constitutes overbroad subject matter regulation that interferes unduly with protected speech because it includes within its prohibition illustrations of currency "that have no utility for fraud or forgery and that cannot be used for counterfeiting" (*id.* at 26a-27a).

Turning to Section 504, which excepts from the broad prohibition in Section 474 black and white illustrations that meet certain size specifications and that are published for "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," the district court determined that this statute effects a "time, place or manner" regulation that is impermissibly content-based because "[n]either the purpose to

[4] The district court rejected the argument that appellee's First Amendment challenge did not present a justiciable controversy sufficient to support federal court jurisdiction under Article III (App. A, *infra*, 15a-19a). The court noted that the Secret Service had issued warnings to appellee over a ten year period that appellee's illustrations were in violation of the statutes, and it observed that federal officials had "never disavowed the possibility of prosecution" (*id.* at 18a). In these circumstances, the court concluded that even though appellee had not actually been prosecuted under the statutes, the controversy was sufficiently concrete to satisfy the requirements of Article III.

which an illustration is put nor the forum in which it appears has any relation to the prevention of counterfeiting" (App. A, *infra*, 30a). In addition, the court held Section 504 impermissibly vague because, it found, an individual would have difficulty determining what is a journal, newspaper or album, and what purposes are philatelic, numismatic, educational, historical, or newsworthy (App. A, *infra*, 31a).

THE QUESTION IS SUBSTANTIAL

As the Framers of the Constitution recognized, the power to establish a monetary system is an essential attribute of national sovereignty.[5] A concomitant of that power is the authority to preserve and maintain the integrity of the Nation's monetary system. See *United States* v. *Marigold*, 50 U.S. (9 How.) 560 (1850). Article I, Section 8 of the Constitution accordingly authorizes Congress to coin money, regulate currency, and punish counterfeiting, and to "make all laws which shall be necessary and proper" for executing those tasks. In exercising these powers, Congress has enacted legislation that restricts the reproduction of photographs of United States currency. Neither the district court nor appellee has suggested that 18 U.S.C. 474 ¶ 6 and 504 exceed Congress' Article I powers. We begin, then, with a presumptively valid federal statute, unchallenged for more than 100 years, and clearly within the powers delegated to the Legislative Branch by the Constitution.

The district court acknowledged that "[t]he government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's currency system" (App. A, *infra*, 26a). Despite this acknowledgement, the court declared unconstitutional a statutory scheme designed by Congress to protect that compelling governmental

[5] During the period following the Revolutionary War, the Nation was plagued with numerous problems over commerce and coinage under the Articles of Confederation. See A. Sutherland, *Constitutionalism in America* 162-166 (1965). James Madison wrote that the power to coin money and punish counterfeiting "supplied a material omission in the [A]rticles of Confederation." *The Federalist* No. 42, at 216 (E. Rhys, ed. 1942).

interest while at the same time permitting publishers to use photographs of currency for expressive purposes. In so holding, the district court expressly declined to follow the decision of the Eighth Circuit in *Wagner* v. *Simon*, 534 F.2d 833 (1976), aff'g 412 F. Supp. 426 (W.D. Mo. 1974), which upheld the statutory scheme against a similar constitutional challenge.

The decision below is based on an incorrect view of the First Amendment. The statutory restrictions at issue are narrow and leave open ample alternative means of communication. The statutory scheme is not directed at the content of any particular message a publisher may seek to convey, but instead regulates only the manner or style in which publishers may illustrate United States currency. It is difficult to believe that the statute truly inhibits a publisher from communicating an idea in an effective manner. Contrary to the district court's apparent assumption, the First Amendment does not guarantee to the press the right to publish photographs of currency in precisely the manner that the press considers most effective.

In any event, if the district court viewed the federal statutory scheme as constitutionally infirm, the court was obligated to give the statute a narrowing or clarifying construction if possible, so as to avoid constitutional problems. Furthermore, if such a construction was not possible, the court should have considered severing the unconstitutional provisions if feasible, rather than striking down the entire statutory scheme on its face. The court below erred in not even considering either of these options.

1. In Chapter 25 of the Criminal Code, 18 U.S.C. 471 *et seq.*, Congress has enacted a comprehensive scheme to define and punish offenses involving the forgery or counterfeiting of the currency and other official obligations of the United States. The statutory scheme punishes the making, uttering, or dealing in counterfeit United States obligations or securities (18 U.S.C. 471, 472, 473); taking impressions of tools used to print United States obligations or securities, or possessing or selling such impressions (18 U.S.C. 476, 477); possessing, using, or selling materials (such as plates, stones and paper) that can be used for counter-

feiting purposes (18 U.S.C. 474 ¶¶ 1-5, 7); and using imitations of United States obligations or securities for advertising purposes (18 U.S.C. 475). In addition, 18 U.S.C. 474 ¶ 6, which was initially enacted in 1864,[6] punishes any person who in any manner makes or executes "any engraving, photograph, print, or impression in the likeness of any * * * obligation or other security [of the United States] * * *." Unlike most of the other anti-counterfeiting statutes in Chapter 25, Section 474 ¶ 6 does not require a showing of a specific intent to defraud, and the courts have consistently interpreted this provision as prohibiting reproductions of United States currency without regard to whether the reproductions are either accurate likenesses of genuine obligations, or are intended to or are capable of deceiving the public. See *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954); *Wholesale Vendors of Texas, Inc.* v. *United States*, 361 F. Supp. 1045, 1047-1048 (N.D. Tex.), aff'd, 486 F.2d 1402 (5th Cir. 1973); cf. *Koran* v. *United States*, 408 F.2d 1321, 1325 n.12 (5th Cir. 1969), cert. denied, 402 U.S. 948 (1971). Section 474 ¶ 6 thus reflects Congress' determination to permit no unauthorized reproductions of United States currency.

In 1958, Congress enacted 18 U.S.C. 504, which provides certain exceptions to the flat ban of Section 474 ¶ 6. The purpose of this statute was explained in identical language in the House and Senate Committee Reports:

> The Secretary of the Treasury, under the authority vested in him by title 18, United States Code, section 474, has normally as a matter of practice for many years made exceptions to the statute by granting special permission to use illustrations of United States bonds and paper money for numismatic, historical, and educational purposes. To prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money.

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[6] The background of Section 474 ¶ 6 is described in the opinion of the district court (App. A, *infra*, 5a-6a). The statute has its origins in Section 11 of the Act of June 30, 1864, ch. 172, 13 Stat. 221-222.

> It is the opinion of the Treasury Department that the printing in publications of black-and-white illustrations of paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting. Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired. A provision is included to require that the negatives and plates used in making the illustrations shall be destroyed after their final use for the purpose for which they were made. Such a requirement has formerly been imposed in cases where the Secretary of the Treasury has granted special permission as a precautionary measure and to avoid investigations of alleged violation where plates and negatives were legitimately made but were merely discarded instead of being destroyed.
>
> The instant legislation will not permit the printing of facsimiles in the likeness of paper money or other obligations, but would limit reproductions to illustrations in publications. * * *

S. Rep. No. 2446, 85th Cong., 2d Sess. 5-6 (1958); H.R. Rep. No. 1709, 85th Cong., 2d Sess. 4 (1958). Thus, as the district court noted (App. A, *infra*, 8a), in Section 504 Congress codified the Secretary of the Treasury's practice of permitting illustrations of United States currency to be used for numismatic, historical and educational purposes. In order to prevent fraud and counterfeiting, the statute imposes certain minimal requirements: illustrations must be in black and white and must be of a certain size, and negatives and plates used to make such illustrations must be destroyed. Finally, Congress emphasized that Section 504 limits reproductions to illustrations in publications and does not permit the printing of facsimiles. See *Wagner* v. *Simon*, *supra*, 412 F. Supp. at 431.

2. a. The district court held that Section 474 ¶ 6 violates the First Amendment by interfering unduly with protected speech. In the district court's view, the statute, which

prohibits all illustrations of currency—including illustrations that are not likely to deceive or to assist counterfeiters—is not tailored with sufficient precision to serve the concededly compelling governmental interest of preventing counterfeiting. We submit that the district court's analysis is flawed in several critical respects.

To begin with, Section 474 ¶ 6 does not implicate the central concern of the First Amendment, which is the restriction of expression because of the message it conveys. The statute does not inhibit appellee or anyone else from expressing any view on any subject. The statute is directed only at the use of illustrations of United States currency, not at the substance of any message appellee wishes to convey. Thus, this is not a situation in which the government has arrogated to itself "the choice of permissible subjects for public debate." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980). So long as the minimal requirement of Section 474 is met, appellee and all others remain free "to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940) (footnote omitted).

The district court did not specifically find, and we seriously doubt, that Section 474's prohibition on publishing photographs of currency actually impairs appellee's ability to communicate ideas effectively. In any event, the First Amendment does not entitle an individual to communicate in precisely the manner he may deem to be most effective, especially where the limitation on expression is unrelated to the content of the message and the individual has available numerous alternative means for conveying that message. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 (1981).

Moreover, the minimal limitation on expression contained in Section 474 ¶ 6 is justified by the compelling governmental interest of preserving the integrity of the Nation's currency system. In this respect, the instant case is analogous to this Court's decisions in *Greer* v. *Spock*, 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights*, 418 U.S.

298 (1974), in which the Court "recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 538. The district court purported to distinguish *Greer* and *Lehman* on the ground that "[t]his case does not concern the availability of a public facility for the exercise of the free speech right by private parties. [Appellee] does not seek to use the United States Courthouse in Foley Square as a facility from which to propound its views" (App. A, *infra*, 25a). But the design and appearance of United States obligations and securities are as much the "property" of the government—and are equally subject to reasonable restrictions on expression designed to protect their integrity—as were the military base in *Greer* and the transit system vehicles in *Lehman*. Cf. *Smith* v. *Goguen*, 415 U.S. 566, 586-587 (1974) (White, J., concurring in the judgment); *id.* at 594-596 (Rehnquist, J. dissenting).[7] Because of the government's compelling interest in preventing counterfeiting, the district court erred in not according Congress greater leeway in deciding what measures are necessary to accomplish that purpose.

b. If the flat prohibition in 18 U.S.C. 474 ¶ 6 is permissible under the First Amendment, then there is no need to address the constitutionality of 18 U.S.C. 504, which creates an exception to the prohibition in Section 474. In any event, Section 504 passes constitutional muster.

[7] In effect, Section 474 ¶ 6 is a copyright statute that limits the uses to which United States obligations and securities may be put. However, in contrast to traditional copyright laws, which seek to promote creativity by giving a copyright owner the right to regulate use of his creation, Section 474 is concerned, not with the property interests of private parties, but with the fundamental societal interest of preserving the integrity of the Nation's currency system. It is ironic that, in the event another magazine publisher sought to copy a photograph of United States currency appearing in one of appellee's magazines, appellee could invoke the copyright laws to protect against infringement. Under the decision below, however, the government is powerless to prevent appellee from printing the photograph in the first place.

Section 504 permits publishers to include illustrations of United States currency in publications, provided that the illustrations are in black and white and are of a certain size, and provided further that the plates or negatives used in making the illustrations are destroyed. Congress deemed these limitations necessary in order to ensure that illustrations of currency would not facilitate counterfeiting or be used for fraudulent purposes. See S. Rep. No. 2446, *supra*, at 5-6; H.R. Rep. No. 1709, *supra*, at 4. These limitations are not directed at the content of the stories that appellee or any other publisher may seek to illustrate. Instead, the limitations merely affect the manner in which an illustration of a dollar bill may be presented. Thus, the statutory scheme may be viewed as a reasonable time, place, and manner regulation that is "'justified without reference to the content of the regulated speech, that * * * serve[s] a significant governmental interest, and that * * * leave[s] open ample alternative channels for communication * * *.'" *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

The district court concluded (App. A, *infra*, 29a), however, that Section 504 is not a proper time, place and manner regulation because in permitting the publication of illustrations of United States currency "for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers or albums," the statute regulates speech on the basis of content or subject matter. In addition, the court below ruled that the "purpose" and "forum" provisions of Section 504 are impermissible because there is an insufficient nexus between the distinctions among the various purposes and forums, on the other hand, and the statutory goal of preventing fraud and counterfeiting, on the other (App. A, *infra*, 30a-31a). Finally, the court held that the "purpose" and "forum" provisions are impermissibly vague because they do not clearly delineate the area of forbidden conduct (*id.* at 31a-32a).

The district court's concerns are unfounded. There is no basis for concluding that appellee or any other magazine publisher would have difficulty satisfying the "purpose" and "forum" provisions of the statute; indeed, there is no evidence that these provisions have ever served as a basis for enforcement of the statute, and we seriously doubt that appellee has standing to challenge them.[8] In any event, these provisions do not authorize the government to restrict expression based on the particular point of view being expressed and they have never been used for that purpose. Thus, Section 504 does not implicate the First Amendment's core concerns. Furthermore, the "purpose" and "forum" provisions were intended simply to differentiate between illustrations of currency appearing in publications and illustrations appearing on facsimiles; accordingly, the provisions clearly serve the anti-counterfeiting goal of the statute. Finally, the "purpose" and "forum" provisions do not render Section 504 unconstitutionally vague. The terms of the statute "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'" and "'provide explicit standards'" for those who are charged with its enforcement. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982), slip op. 8.

Even if some or all of the district court's concerns with Section 504 are valid, the court erred in striking down the statute without attempting either to clarify its meaning or to interpret it more narrowly in order to alleviate those concerns. It is well settled that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it

[8] "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 20. Although the Court has carved out an exception to this proposition where a party raises a First Amendment overbreadth claim (see *id.* at slip op. 21), appellee's challenge to the "purpose" and "forum" provisions of Section 504 does not rest on a claim that these provisions are overbroad.

should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 22 n.24. See, e.g., Crowell v. *Benson*, 285 U.S. 22, 62 (1932). Moreover, the Court will not reject a construction that saves a statute from unconstitutionality merely because another construction is arguably more consistent with Congress' intentions; "an Act of Congress ought not be construed to violate the Constitution if any other *possible* construction remains available." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979) (emphasis added).

Section 504 clearly is susceptible of such a limiting construction. The legislative record does not support the view that Congress intended officials of the Executive Branch to enforce the statute based on the content of the stories accompanying an illustration of currency. Rather, as the district court itself pointed out (App. A, *infra*, 8a), Congress merely sought in Section 504 to institutionalize the Treasury Department's settled practice of permitting publishers of books, journals and newspapers to use illustrations of currency for legitimate numismatic, historical, educational, or newsworthy purposes. Thus, the reference to the various "purposes" and "forums" may be construed as descriptive and illustrative, rather than prescriptive and mandatory. The legislative history makes clear that the overriding congressional objective in enacting the statute was simply to permit the use of illustrations of currency "in publications," in order to accommodate expressive interests and minimize the intrusion on First Amendment values, while at the same time continuing to prohibit "the printing of facsimiles in the likeness of paper money or other obligations * * *." S. Rep. No. 2446, *supra*, at 6; H.R. Rep. No. 1709, *supra*, at 4.[9] So construed, the statute does

[9] The district court failed to describe a single instance, and we are aware of none, in which government officials have initiated or threatened to initiate a prosecution to enforce the prohibition of Section 474 ¶ 6 based on an alleged violation of the "purpose" and "forum" provisions of Section 504. The Treasury Department's warnings to appellee recounted in the district court's opinion (App. A, *infra*, 10a-13a) all re-

not suffer from any of the constitutional defects that the district court perceived.

Furthermore, even if the district court had concluded that the statute could not be saved by judicial construction, the court should have considered severing the unconstitutional provisions rather than striking down the statute on its face. See *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585-587 (1968). Thus, if the court was concerned by the lines drawn by Section 504, the court should have invalidated that section and left Section 474 ¶ 6 intact.

There can be no serious dispute that Sections 474 ¶ 6 and 504 are severable. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932). Here, it is quite plain that Congress did not view the two statutes as inseparable, because they were enacted nearly a century apart.

3. In the concluding portion of its opinion, the district court noted that 18 U.S.C. 474 ¶ 6 was initially enacted in 1864 and that, "[i]n the meantime, technology has come a long way and this case represents a clash between an old law and the needs of a modern society" (App. A, *infra*, 32a). The apparent implication of this statement is that while Section 474 ¶ 6 may have been constitutional at one time, intervening technological changes have rendered it unconstitutional. This premise, which underlies the decision below, is simply incorrect.

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lated to alleged violations of the color and size requirements of Section 504.

The Treasury Department apparently has taken the position that Section 504 prohibits illustrations used primarily for "decorative" or "eye-catching" purposes and that illustrations must be accompanied by information relating to the particular item illustrated (see App. A, *infra*, 15a n.9). However, the opinions of the Treasury Department are advisory only, and are not binding on the Department of Justice, which is responsible for initiating prosecutions under the statute. Thus, the Treasury Department's position should not serve as a basis for striking down the statute on its face.

On the contrary, advances in technology have helped to facilitate the work of counterfeiters while making detection and enforcement more difficult. It is important to understand, in this regard, that the focus of the Secret Service's enforcement efforts under Section 474 ¶ 6 is not on the finished product, such as a distorted, oversized photograph of a dollar bill on a magazine cover, but rather on the negative used to produce the cover, which could be used by an individual intent on counterfeiting currency. Given the current state of the technology, it is the negative that is the essential raw material of the counterfeiter. In fact, we have been advised that, in the experience of the Secret Service, it has become increasingly common for individuals to deal in photographic negatives of currency without actually manufacturing counterfeit currency. Thus, subject to the exceptions in Section 504, the flat prohibition in Section 474 ¶ 6 is essential to fulfilling the compelling governmental interest of preventing counterfeiting.[10]

[10] We note that legislation has been introduced in Congress that would amend 18 U.S.C. 504 to permit publishers to print illustrations of United States currency in color and to permit the use of currency illustrations for advertising purposes. H.R. 4275, 97th Cong. 1st Sess. (1981). See 127 Cong. Rec. H4993 (daily ed. July 27, 1981) (remarks of Rep. McClory). The Department of the Treasury has submitted to the Chairman of the Subcommittee on Justice of the House Committee on the Judiciary a statement opposing the proposed amendment. We are including a copy of the Treasury Department's statement as an appendix to this jurisdictional statement. See App. D, *infra*, 38a–44a.

In that statement, the Treasury Department makes the following observations (App. D, *infra*, 41a, 43a):

> The very fact that the technology is so advanced and quality printing is so widespread makes the suppression of counterfeiting activities all the more difficult. Counterfeiters, like printers, have benefited from today's advanced technology. In both instances, the "elite technology" has been replaced by the photomechanical process.
>
> It is important that the legitimate possession of negatives of United States currency be held to an absolute minimum. Although plates and negatives may be created for a legitimate purpose, their relative availability tempts individuals to use them for counterfeiting purposes. Press and photo lab technicians have perfected negatives under the guise of an advertisement project or even while actually working on a legitimate job, while others

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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Solicitor General

J. PAUL MCGRATH
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OCTOBER 1982

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have had their interest sparked by discovering the ease with which a note can be counterfeited.

* * * * *

Furthermore, permitting the use of color illustrations would provide justification for possessing separate plates and negatives of the note, Treasury seals and serial numbers. This color separation process is a crucial step towards counterfeiting obligations. Under current law, only black and white illustrations are permissible; and therefore, only one negative in the printing process is required. Dropping the black and white restriction brings the legitimate printers a few steps closer to an actual counterfeiting operation.

We will apprise the Court of any new legislative developments. However, it does not appear that enactment of H.R. 4275 would cure the defects that the district court perceived in Section 504, because the proposed legislation would leave unchanged the size requirement and the "purpose" and "forum" provisions of the statute.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 3218 (VLB)

TIME, INC., PLAINTIFF,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York, DEFENDANTS.

Opinion 53248

Filed June 4, 1982

VINCENT L. BRODERICK, U.S.D.J.

I.

This civil action, in which plaintiff seeks declaratory and injunctive relief, involves a challenge to the constitutionality of two provisions of the federal anti-counterfeiting laws

that either prohibit or regulate the publication or production of any likeness of United States currency. Jurisdiction of this court rests on 28 U.S.C. § 1331, as amended Dec. 1, 1980, Pub. L. 96-486, § 2(a), 94 Stat. 2369. Declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202 (1976).[1]

Plaintiff Time Inc. ("Time") is a New York corporation with its principal place of business in New York City. It publishes various periodicals—*Time*, *Fortune*, *Sports Illustrated*, *Life*, *Money*, *People*, and *Discover*.[2] Defendants are various United States Government officials who are statutorily charged with the administration and enforcement of the counterfeiting laws of the United States.[3]

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[1] 28 U.S.C. § 2201, captioned "Creation of remedy," provides that:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202, captioned "Further relief," provides that:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Both sections are procedural in nature, designed to simplify the ascertainment of uncertain rights, *Cooms* v. *Adkinson*, 414 F. Supp. 975 (D.S.D. 1976), and neither serves as an independent predicate for federal court jurisdiction. *Donahue* v. *Butz*, 363 F.Supp. 1316 (N.D. Cal. 1973). Sections 2201 and 2202 may be resorted to for additional remedies in situations where jurisdiction already exists. *Terminal Freight Handling Co.* v. *Solien*, 444 F.2d 699 (8th Cir. 1971), *cert. denied*, 405 U.S. 996 (1972). Plaintiff properly invokes §§ 2201 and 2202 as there exists an independent basis for jurisdiction, namely 28 U.SC. § 1331.

[2] *Fortune* and *Money* focus primarily on matters pertaining to finance and the economy, while the other magazines report from time to time on financial matters and issues (*Time* and *Life*), or may refer from time to time to such matters and issues in the course of treating the areas in which they specialize (*Sports Illustrated*, *People*, and *Discover*).

[3] Donald T. Regan is Secretary of the United States Department of the Treasury, responsible for the enforcement of the laws of the United States which define, and provide for the punishment of, counterfeiting and forgery of United States currency. H. Stuart Knight is Director of the United States Secret Service, a division of the Department of the Treasury, and is responsible for the detection and arrest of persons who violate federal counterfeiting laws. William French Smith is the Attorney General of the United States, responsible for the ad-

Plaintiff alleges that the challenged provisions are overbroad and void for vagueness, and that they impermissibly infringe upon plaintiff's First Amendment rights of freedom of speech and of the press.[4] Plaintiff has moved and defendants have cross-moved for summary judgment. Fed.R. Civ. P. 56.

II.

The United States Constitution grants Congress broad power to legislate to "coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures," art. I, § 8, cl. 5, and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." art. I, § 8, cl. 6. The power to coin money has been long recognized as carrying the correlative power to protect it. *United States* v. *Marigold*, 50 U.S. 560, 9 How. 560 (1850). The *Marigold* Court upheld an Act of Congress, 4 Stat. at large 121, ch. 65, providing for the prosecution of those involved in counterfeiting any coin in the resemblance of United States currency.

Chapter 25 of Title 18 of the United States Code contains those laws which prohibit the alteration, counterfeiting or forgery of the coins, obligations and securities of the United States Government and of foreign governments, and which provide criminal sanctions with respect to such activities.

This case involves the impact of two of the provisions of Chapter 25—the sixth paragraph of § 474, and § 504.

1. 18 U.S.C. § 474.

18 U.S.C. § 474 (1976) is one of 39 sections in Chapter 25, and is captioned "Plates or stones for counterfeiting

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ministration of the United States Department of Justice, including its activities with respect to the nation's penal laws. James R. D'Amelio is Special Agent in Charge of the New York Field Office of the United States Secret Service. John S. Martin, Jr. is the United States Attorney for the Southern District of New York.

[4] The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

obligations or securities."[5] Paragraphs one through five and paragraph seven of § 474 criminalize the possession, use, importation, sale and forgery of materials which can

[5] 18 U.S.C. § 474 reads as follows:

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other things, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

June 25, 1948, ch. 645, 62 Stat. 706.

actually be used for counterfeiting purposes, such as plates, stones and paper. The sixth paragraph of § 474, one of the provisions challenged herein, makes it a crime to create a photograph, print or impression of "any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States":

* * * * *

> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security,[6] or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States:
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. § 474 ¶ 6.

Section 474 traces its roots to Section 11 of "An Act to provide Ways and Means for the Support of the Government, and for other Purposes," ch. 172, 13 Stat. 218, 221-222, which was enacted on June 30, 1864.

Drafted as a measure to raise money for the War Between the States, the Act provided, *inter alia*, for the issuance of various federal obligations, and it set forth penal provisions with respect to the counterfeiting and forgery of federal obligations. Thus Section 10 of the Act provided criminal sanctions against the forgery, counterfeiting or alteration of United States obligations and the passing or uttering of counterfeits. Section 12 made it a federal crime to possess without lawful authorization "any engraved or transferred plate, block, or electrotype" from which U.S.

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[6] The antecedent of the words "any such obligation or other security" in the sixth paragraph of Section 474 appear in the fifth paragraph of Section 474, and are quoted in this opinion immediately before the text of the sixth paragraph. *See* fn. 5, *supra*, for full text of Section 474.

obligations were or would be made; or any die, roll, or original work used in the making thereof; or any materials made "after the similitude" thereof.

Section 11 of the 1864 Act is the ancestor of Section 474. The sixth paragraph of Section 474 traces its genesis to the following language of Section 11:

> ... if any person shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, or in any manner made or executed, or shall aid in printing, photographing, making, or executing any engraving, photograph, or other print or impression in the likeness or similitude of any obligation or other security, or any part or parts thereof, or shall vend or sell any such engraving, photograph, print, or other impression, except to the United States, or shall bring into the United States from any foreign place any such engraving, photograph, print, or other impression, except by the direction of some proper officer of the United States ... every person so offending shall be deemed guilty of a felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, or by imprisonment and confinement at hard labor, not exceeding fifteen years, or by both, in the discretion of the court.

The proceedings of the 38th Congress shed virtually no light on its intent with respect to the anti-counterfeiting sections of the 1864 Act. The sole reference to § 11 in the course of the House pre-enactment consideration of the Act pertained to a modification of the sentence and fine provisions, which was made. There was apparently no significant discussion of § 11 in the Senate.

But Section 11 of the statute passed in 1864 to help finance the Union in the War Between the States is, in substance, the law of the United States today. With minor changes in language, it was re-enacted as § 5430 of the Revised Statutes of 1878, Tit. LXX, ch. 5, Rev. Stat. 1052 (December 1, 1878), and re-enacted again as § 150 of the codification of 1909, ch. 321, 35 Stat. 1116 (March 4, 1909). As revised in 1909, the substance of Section 11 made its way through the first three editions of the United States Code; it was re-enacted once again with minor changes in phraseology in the 1946 recodification of the penal laws, *see* ch. 645, 62 Stat. 706 (1948), and appears in that form in Section 474 of Title 18.

2. 18 U.S.C. § 504.

18 U.S.C. § 504 (1976), which is the second provision challenged in this action, was substantially amended in 1958 to provide certain statutory exemptions to the flat ban of § 474. Notwithstanding the prohibitions contained in the sixth paragraph of § 474, § 504 permits the printing or publishing "of illustrations" of United States currency "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers or albums." Such illustrations must be "in black and white", and they must be "of a size less than three-fourths or more than one and one-half, in linear dimension," of the currency illustrated. Excepted from these requirements are motion-picture films, microfilms or slides for screen projection or telecasting.[7]

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[7] 18 U.S.C. 504, captioned "Printing and filming of United States and foreign obligations and securities," reads as follows:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, or illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,
>
> for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;
>
> (ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except

The legislative history indicates that Congress intended in § 504 merely to institutionalize the practices of the Treasury Department:

> The Secretary of the Treasury, under the authority vested in him by title 18, United States Code, section 474, has normally as a matter of practice for many years made exceptions to the statute by granting special permission to use illustrations of United States bonds and paper money for numismatic, historical, and educational purposes. To prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1-½ times the size of the genuine paper money.
>
> It is the opinion of the Treasury Department that the printing in publications of black-and-white illustrations of paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting. Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining

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that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term "postage stamp" includes postage meter stamps.

June 25, 1948, ch. 645, 62 Stat. 713; Sept. 2, 1958, Pub.L. 85-921, § 1, 72 Stat. 1771; June 20, 1968; Pub. L. 90-353, § 1, 82 Stat. 240; Oct. 14, 1970, Pub. L. 91-448, § 2, 84 Stat. 921.

> special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired. A provision is included to require that the negatives and plates used in making the illustrations shall be destroyed after their final use for the purpose for which they were made. Such a requirement has formerly been imposed in cases where the Secretary of the Treasury has granted special permission as a precautionary measure and to avoid investigations of alleged violation where plates and negatives were legitimately made but were merely discarded instead of being destroyed.

S. Rep. No. 2446, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 5268, 5272.

III.

Plaintiff contends that the sixth paragraph of § 474, and § 504, prohibit plaintiff and others from using illustrations of money as vehicles for the expression of opinions and ideas, except in accordance with narrow and arbitrarily defined criteria. It further contends that under the criteria set forth in these provisions the Government has the power, which it freely exercises, to determine if given material, i.e., illustrations or likenesses of U.S. currency, in a newspaper or magazine qualifies as news. It submits that in light of the adverse impact which these statutes have on the plaintiff's right of free speech and right freely and without restriction to publish and comment upon the news, they are unconstitutional on their face, and as applied to the activities of plaintiff.

More specifically, plaintiff contends that illustrations of money serve as powerful symbols in countless contexts in the reporting of, and in commentary on, the news and in the free exchange of ideas; that absent some compelling governmental need the use of such symbolic illustrations may not constitutionally be curtailed; that even if some compelling governmental need were identified, the constraints upon the use of illustrations of money for symbolic purposes in public reporting and discourse must be narrowly crafted to serve that need with the minimal possible impact upon freedom of speech and of the press; and that no constitutionally cognizable compelling governmental need can be identified with respect to the challenged provisions.

The defendants contend that the sixth paragraph of § 474, and § 504, constitute reasonable exercises of the power of the government to prevent counterfeiting and to preserve and maintain the integrity of the currency system of the United States, and that they are constitutional facially and as applied to plaintiff. They assert that the restrictions imposed by the statutory scheme are directed not to the content of the articles which plaintiff seeks to illustrate, but to the manner or style in which money is illustrated, and that those restrictions are minimal. They maintain that the First Amendment does not guarantee to plaintiff the right to illustrate money as a symbol in precisely the manner plaintiff happens to consider most effective.

Defendants also challenge the existence of any case or controversy between plaintiff and defendants.

IV.

The material facts, summarized in this section, are not in dispute.

Illustrations of money are used by plaintiff as symbols. Within the past fifteen years, plaintiff's magazines have at various times utilized illustrations, photographic or otherwise, of United States currency to symbolize the toll of inflation, to represent the economic issues at stake in a presidential election, to comment upon political scandals, and to convey information or commentary upon matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in amateur basketball. On many of these occasions some representative of the Treasury Department has warned plaintiff that specific illustrations violated Chapter 25 of Title 18.

The illustrations depict money in undersize or oversize, and they distort it. Since they appear on only one side of a printed page, the illustrations show at most only one side of any currency depicted.

1. The December 14, 1970 front cover of *Time* featured a photographic reproduction in color of approximately one-quarter of the face of a $1 federal reserve note, blown up five times and partially obscured by red printed legends. The illustration related to a story appearing in the magazine about inflation. About a month after publication, an agent of the Secret Service advised Time's production department that the illustration was illegal on the ground that

federal law barred publication of any likeness of currency in color. He warned that Time must cease and desist from further violations.

2. An inside page of the July 29, 1974 issue of *Time* bore a photographic reproduction, in black and white, of approximately one-half of the face of a $1 bill, substantially obscured by an overlay of a life preserver. The illustration accompanied an essay on "How to Mobilize Against Inflation." About two months after publication, a Secret Service agent visited an attorney in Time's legal department and advised him that the illustration violated § 504, which barred any black-and-white illustration that was not less than three quarters nor more than one and one-half times actual size. The agent warned that Time must cease and desist from further violations.

3. On the February 23, 1976 front cover of *Time* appeared a photographic reproduction in black and white of a $1000 bill, substantially obscured by an overlaid printed legend and by an overlaid graphic design. The illustration related to a story within the magazine entitled "The Big Payoff," concerning allegations of international bribery by an American aircraft firm. In a letter dated February 24, 1976 the assistant legal counsel to the director of the Secret Service notified Time that in the opinion of the Department of the Treasury, the cover illustration violated § 504. The letter set forth that to qualify under § 504 the illustration must not only meet the size requirements but must "appear in articles, books, journals, newspapers, or albums for historical, educational, numismatic or newsworthy purposes." The letter further stated that "[t]he Department has taken the position that in order for an illustration to be permissible it must be accompanied by information about the particular [sic] item reproduced and cannot be used for decorative or eye-catching purposes." On February 25, 1976 Secret Service agents visited Time's legal department to warn that Time must cease and desist from further violations.

4. The November 1, 1976 front cover of *Time* carried a photographic reproduction in color of $1, $10, and $20 bills clutched in a human hand. The bills were folded lengthwise, and photographically reduced to less than one-half actual size. With respect to most of the photographed bills, only a part of an outside border, or the border and a fragment of a single numeral, was visible. The legend, "Voting Your

Pocketbook," was splashed across the bottom of the cover. The illustration bore upon the impending Presidential election and the impact of inflation on voting trends, which was the subject of a story within the magazine. The assistant legal counsel to the Secret Service notified Time's legal department by letter dated November 18, 1976 that the color illustration violated § 474. The letter reviewed previous warnings which had been given to plaintiff, including those with respect to the July 29, 1974 and February 23, 1976 issues of *Time*, and advised plaintiff "to cease and desist from the use of any future reproductions of currency appearing in color . . ." The letter warned: "If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action."

5. *Fortune's* February 12, 1979 front cover photographically reproduced, in color, federal reserve notes enclosed within a money clip. The notes were folded twice widthwise, and enlarged to more than twice their actual size. Only fragments of the outside borders of most of the notes were visible. Approximately one-third of the reverse side of the top $1,000 note was visible, substantially obscured by the overlaid money clip. The illustration pertained to a story about "America's Invisible Rich" appearing within the magazine. About nine months after publication, a Secret Service agent telephone Time's legal department to inform it that the illustration violated §§ 474 and 504, which barred any color likeness, and that he had been instructed to give Time a "'slap on the wrist.'"

6. The February 16, 1981 front cover of *Sports Illustrated* sported a photographic reproduction in color of $100 federal reserve notes pouring into and stuffed inside a basketball hoop and attached net. The notes were reduced to approximately one-third actual size, and each was visible only in part; most were substantially obscured by overlaid portions of other notes, by the basketball hoop or net, or by an overlaid printed caption, "Anatomy of a Scandal." The illustration related to a story in the magazine about a "point-shaving" scheme in amateur basketball. On May 18, 1981 a Secret Service agent informed Time's legal department that the illustration violated § 474 and that it would be necessary for the Service to seize all plates and materials used in connection with the production of that cover. The agent requested the names and addresses of all the printers who

prepared the cover and further requested an "interview" with a member of Time's management, with counsel present if so desired. The agent stated that the statutory prohibition against publication of currency illustrations aimed to forestall the possibility that a printer involved in the process of creating the illustrations might conclude that it was easy to copy currency, and thus be inspired to do so for profit.

On occasion the Secret Service advised plaintiff to alter illustrations it intended to use.

1. The September 10, 1965 front cover of *Time* ultimately carried a painted portrait of Secretary of the Treasury Henry Fowler with an artist's black-and-white rendering of a $10 bill. Time had originally planned to use a color painting of a furled $10 federal reserve note on which the portrait of Alexander Hamilton, the legend, "United States of America," and the arabic numeral "10" would have been visible. However, when *Time* sought the views of the Secret Service as to the lawfulness of the background painting, it was advised that it was illegal, and the illustration was changed.

2. The July, 1977 issue of *Fortune* displayed a photographic reproduction of several rows of United States coins receding into the background, where three open doors stood in the dark sky. *Fortune*'s editors had originally intended to use three $100 bills as a landscape set beneath the three open doors. Each of the bills was significantly enlarged, shown only in part, and distorted in color, shape, and size. When the legal department of Time sought the views of the Secret Service, it was told that the intended illustration was illegal.

To the editors of plaintiff's magazines the use of illustrations of money as symbols is important in reporting news, in analyzing for their readers complex financial and economic concepts, and in facilitating commentary on national and world affairs.

V.

The sixth paragraph of § 474 certainly reaches all and any likenesses of United States currency. By its terms it prohibits the printing of any "engraving, photograph, print, or impression" in the likeness of any portion of any specimen of United States currency. Thus it does not matter

whether the likeness is good or bad, true to size or distorted, faithful to the true color or discolored, printed on paper similar to currency or impressed on waxpaper. Any likeness of any part of United States currency, whether or not capable of deceiving anyone, or whether or not intended to express an abstract idea, is banned by the language of the provision. The print of a drawing of the corner of a ten dollar bill is prohibited. A button showing the pyramid on the back of a one dollar bill is prohibited. A 3-foot by 2-foot blow-up of a twenty dollar bill with substituted numbers and language is prohibited.[8] A painting of the back of a one thousand dollar bill covering the wall of a barn is prohibited. A print of a fingernail charcoal sketch of the name of the United States of America as it appears on a twenty dollar bill is prohibited. An engraving of the legend, "In God We Trust," found on the back of a ten dollar bill, is prohibited. A plastic impression of a dollar bill is prohibited.

The sixth paragraph of § 474 does not by its terms require intent to defraud, to deceive, to counterfeit. One violates the law simply by creating, executing, selling or bringing into the United States any kind of likeness of United States currency or any part thereof, whether or not the likeness is such that it might assist a counterfeiter in the reproduction of fraudulent notes or deceive a person into accepting such notes as legal tender for a debt.

Section 504 provides exemptions from the total ban imposed by the sixth paragraph of § 474. It permits the printing or publishing of "illustrations" of United States currency which meet *all* of the following requirements: (a) they must be in black and white; (b) they must be "of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated"; (c) they must appear "in articles, books, journals, newspapers, and albums"; and (d) they must be for ". . .philatelic, numismatic, educational, historical, or newsworthy purposes." The word "illustration" does not appear in § 474. Neither § 504 nor any other provision of applicable law contains any definition of "illustration" or of "philatelic, numismatic, educational, historical, or newsworthy purposes."

The Treasury Department, which through the Secret Service is primarily responsible for the enforcement of the

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[8] *See Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *affirmed*, 534 F.2d 833 (8th Cir. 1976).

counterfeiting laws, requires in addition that an illustration otherwise permitted by § 504 "be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated."[9] The Treasury Department has also taken the position that § 504 does not exempt illustrations which are "used primarily for decorative or eye-catching purposes."

VI.

"[C]oncrete legal issues, presented in actual cases, not abstractions" are an absolute requisite for adjudication of legal disputes. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940). *See also Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 443 (1938).

Although 28 U.S.C. § 2201 authorizes the court to declare the rights of the parties before it, the statute permits no relief which is not "consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

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[9] Paragraph 14 of defendants' amended answer reads in part as follows:

> . . . Defendants admit that in the opinion of the Department of the Treasury section 504 prohibits illustrations used primarily for decorative or eye-catching purposes and also requires that an illustration permitted by the section be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated.

Thus the initial inquiry is whether there exists a justiciable controversy sufficient to support the jurisdiction of a federal court. U.S. Const. art. III, § 2.[10]

The Government asserts an absence of justiciability because plaintiff has not been arrested and prosecuted under the statutes. The gist of its argument is that a finding of justiciability may not be predicated upon a pattern of warnings: only an actual prosecution creates an Article III controversy.

This is not the law. "[I]t is not necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974). Justiciability exists where plaintiff's "challenge is to those specified provisions of [federal] law which have provided the basis for threats of criminal prosecution . . ." *Id.* "[Plaintiff] should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).[11]

Plaintiff as a magazine publisher claims First Amendment protection for its use of illustrations of currency for symbolic purposes in connection with articles it has published and intends to publish in the future in its various magazines. The provisions of the sixth paragraph of § 474, and of § 504, read together, proscribe the creation or publication of such illustrations: by the very terms of those provisions the creation of illustrations such as those already published by plaintiff constitutes a federal offense, regardless of intent or malice. Defendants certainly regard illustrations of United States currency already used by plaintiff as contravening the statutory prohibitions, and have repeatedly warned plaintiff of its criminal transgressions.

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[10] Article III, § 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .—to Controversies to which the United States shall be a Party; . . .

[11] In *Doe* v. *Bolton*, the Court held that where physicians licensed by the state who are consulted by pregnant women attack the constitutionality of a "recent and not moribund" state abortion statute which is the successor to another abortion statute under which physicians were prosecuted, they have standing to challenge the statute and a justiciable controversy is presented. 410 U.S. at 188-189.

Plaintiff has been told that if it does not cease and desist "from the use of any future reproductions of currency appearing in color," the matter will be turned over to the United States Attorney for "appropriate action."[12] There have been relatively recent court cases involving violations of the sixth paragraph of § 474, although only one of them entailed a constitutional challenge analogous to that proffered by plaintiff in this case.[13]

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[12] Letter to associate counsel of plaintiff from assistant legal counsel of the Secret Service, dated November 18, 1976:

> We are again advising Time, Incorporated to cease and desist from the use of any future reproductions of currency appearing in color or for advertising purposes. If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action.

This element of threatened prosecution is what distinguishes this case from *Poe* v. *Ullman*, 367 U.S. 497 (1961). In *Poe* v. *Ullman*, Connecticut statutes enacted in 1879 prohibited the use of contraceptive devices and the dispensation of medical advice concerning that use. There had been only one prosecution thereunder, a test case in 1940 to determine constitutionality. Plaintiffs in *Poe* sued for declaratory judgments, challenging the statutes on Fourteenth Amendment grounds. The Court found no justiciable controversy because there was no threat of prosecution:

> "The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . ."

367 U.S. at 504-505, quoting from *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). There was no allegation, explicit or implicit, that appellee Ullman threatened to prosecute plaintiffs under the statutes. 367 U.S. at 501.

This case is in a different factual posture than *Poe* v. *Ullman*. There have been many warnings emanating from the Treasury Department over the years, which are discussed in the text at pp. 10-16, *supra*. There have also been various criminal prosecutions under § 474, *see* fn. 13, *infra*.

[13] *Wagner* v. *Simon*, 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976). *See* discussion, *infra*, on pp. 36-37.

In *Wholesale Vendors of Texas, Inc.* v. *United States*, 361 F.Supp. 1045 (N.D. Tex.), *aff'd mem.*, 486 F.2d 1402 (5th Cir. 1973), a manufacturer of novelty items sold through vending machines sought a judgment declaring, *inter alia*, its right to manufacture "play money" seized from its premises by agents of the Secret Service. The district court denied the request, stating its unwillingness "to hold that the Treasury and Secret Service agents were without authority to seize and retain the [likenesses] in question." 361 F.Supp. at 1048. The

The absence to date of prosecutorial action with respect to plaintiff does not diminish or lessen the immediacy and ripeness of this controversy: "[c]ontingency of official enforcement of clearly applicable criminal prohibitions should not be grounds for denying present review, even if there is no demonstrated threat of prosecution." 13 *Wright, Miller & Cooper, Federal Practice and Procedure:* Jurisdiction § 3532 at 247 (1975). The warnings emanating from the Treasury Department have been over a period of at least ten years. The United States Attorney has never disavowed the possibility of prosecution.[14] Despite the lack of a federal indictment, "there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a

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plaintiff had received conflicting information from various officers of the Department of Treasury. No First Amendment interest was asserted and no constitutional question was decided.

In *Koran* v. *United States*, 408 F.2d 1321 (5th Cir. 1969), *cert. denied*, 402 U.S. 948 (1971), defendant was convicted for the unlawful possession of a one-dollar silver certificate under the fifth paragraph and for unlawful printing of the certificate under the sixth paragraph of § 474. Defendant had discussed plans to print a large quantity of counterfeit currency with a government informer which led to his investigation and arrest by the Secret Service. The case involved a Fourth Amendment claim; no First Amendment interest was asserted nor did the Court of Appeals mention that issue.

In *Webb* v. *United States*, 216 F.2d 151 (6th Cir. 1954), the Court of Appeals affirmed the conviction under the sixth paragraph of § 474 of two people engaged in a confidence game which included an effort to defraud the victim through the use of crudely counterfeited money. The likenesses were executed with the intent to commit a crime. The constitutionality of § 474 was not mentioned, and no First Amendment claim was asserted.

[14] It is instructive to note the posture of plaintiffs in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981). The active associations there filed suit for declaratory and injunctive relief upon receiving advice from the Postmaster in White Plains, New York, that continuation of their practice of using letter boxes for the delivery of unstamped notices could result in a fine up to $300. There is no indication that any member of the civic organizations had any contact with the Justice Department or any other law enforcement agency respecting their alleged violations of the postal statute. While a court may, *sua sponte*, raise the question of subject matter jurisdiction, neither the district judge, nor the Court of Appeals, nor any of the five justices of the United States Supreme Court who wrote opinions in the case voiced any question as to the justiciability of the matter.

declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, *supra*, 312 U.S. at 273. The matter before me is ripe for Article III adjudication.

VII.

As a threshold matter, I consider 1) whether plaintiff's use of illustrations of money in various contexts constitutes in its content speech which is protected by the First amendment,[15] and 2) the nature of the statutory provisions which are challenged.

1. *Plaintiff's illustrations of money as protected speech.* The illustrations reviewed in the earlier portion of this opinion make it clear that plaintiff used illustrations of money symbolically—to dramatize or illustrate a set of facts, an existing condition, a moral crisis, a course of conduct. "A picture," it has been said, "is worth a thousand words." Certainly the use by plaintiff of illustrations of money in connection with its various magazine articles gave emphasis, thrust, and even poignancy to the messages of the articles to which the illustrations pertained. A dollar bill worth seventy-three cents, with George Washington shedding a tear, constituted graphic editorial commentary on the ravages of inflation; a hoop and net stuffed to overflowing with hundred dollar bills was a powerful statement of the impact of gambling on the sport of basketball. The image of money is a powerful, expressive symbol, of significant value to members of the press, including plaintiff, in communicating information and ideas on a wide range of issues of vital public interest.[16] It is, to state the obvious, a particularly effective symbol for the communication of ideas about money itself. The economy, inflation, money supply, foreign trade imbalances, interest rates, and national deficit have all been part of the stuff of analytical and interpretive news

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[15] When a court is asked to determine whether a species of speech is covered by the First Amendment, it must look to the content of the expression. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (libel); *Miller* v. *California*, 413 U.S. 15, 23 (1973) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942) (fighting words).

[16] "Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad* v. *Borough of Mount Ephriam*, 452 U.S. 61, 66 (1981).

reporting in recent years—reporting which has driven home to the individual citizen the impact of these matters on his or her daily life. To the extent that illustrations of money as symbols, used in connection with newspaper and magazine reporting on such matters, have explicated or made more comprehensible the very complicated concepts being treated, to that extent the public has been well served.

Since the use of the symbol of money by plaintiff has been, and will continue to be, intimately related to the expression and communication of ideas, I find that the publication or printing of illustrations of United States currency by plaintiff is protected speech under the First Amendment. It does not entail expression which is deemed by the nature of its content to be subject to regulation in the interests of the public weal. Publishing illustrations of currency does not involve speech characterized by the Supreme Court as posing a "clear and present danger," *Schenck* v. *United States*, 249 U.S. 47 (1919), as "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), as "defamation," *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), as "obscenity," *Miller* v. *California*, 413 U.S. 15 (1973), as "libel," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), or as "commercial speech," *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Thus absent constitutionally permissible overriding considerations, plaintiff has a First Amendment right to publish or print illustrations of United States currency.

2) *The nature of the challenged statutory provisions.*

The sixth paragraph of § 474 prescribes a comprehensive ban on all likenesses of United States currency. It is triggered by the unauthorized presence of an illustration of money, as symbol or otherwise, and it purports totally to remove that illustration from the national discourse. It is a subject matter regulation.

Section 504 is a content-based measure which would allow certain illustrations of money ("black and white" and "less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated") to appear in certain forums ("articles, books, journals, newspapers, or albums"), provided that they were created for a particular purpose ("philatelic, numismatic, educational, historical, or newsworthy"). The statute necessarily

vests officers of the executive branch with power to determine the content and purpose of the illustrations. No guiding definitions are set out as to what constitutes an illustration or a philatelic, numismatic, educational, historical, or newsworthy purpose.

In summary, the sixth paragraph of § 474 targets one particular set of illustrations (illustrations of money) for proscription while § 504 is a line-drawing regulation involving the discretion of government officials with respect to content, purpose, and location in determining the availability of exemptions from that proscription.

VIII.

The determination of the nature of plaintiff's speech and of the challenged statutes aids in ascertaining the applicable legal principles developed over the years in First Amendment law.[17] If speech is protected by the First Amendment, a statute which impinges upon that speech must be narrowly drawn so as to be an efficacious means of achieving permissible objectives of the government. *See*, e.g., *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). The statute must be narrowly aimed at the permissible objectives and it must to the extent possible avoid impinging on protected speech. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972).

"Although [the government] may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider* v. *State*, 308 U.S. 147, 160 (1939). Regulations addressed to legitimate governmental goals cannot "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 337 U.S. 288, 307 (1964). This is the "overbreadth doctrine": a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control but ... sweeps within its

[17] *See* A. Cox, *Freedom of Expression* (1981) at 6: "Classification is important ... because the earlier efforts to bring all first amendment cases under a 'clear and present danger' test have rightly given way to a variety of standards keyed to the character of the restriction."

ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

Where a statute impinges upon protected speech, the burden is on the government to establish the validity of its asserted interests. *Schneider* v. *State*, *supra*, 308 U.S. at 161. The judiciary has an overriding obligation "to assess the substantiality of the justification[s] offered," *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 69 (1981), and to ensure that the regulation promotes legitimate governmental ends with minimal intrusion on First Amendment freedoms. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes* v. *Oradell*, 425 U.S. 610 (1976). "The breadth of legislative abridgment must be viewed in the light of less dramatic means for achieving the same basic purpose." *Shelton* v. *Tucker*, *supra*, 364 U.S. at 488. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967).

Where the government regulation is aimed at the noncommunicative impact of protected speech and at harm not caused by the ideas or information contained in that speech, the regulation may be upheld so long as it does not *unduly* constrict the flow of information. *See Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) [upholding ordinance requiring parade permits where official discretion was limited exclusively to considerations of time, place, and manner: "[T]he question in a particular case is whether [a] control is exerted so as not to *deny* or *unwarrantedly* abridge the right of assembly and the opportunities for the communication of thought . . ." *Id.* (emphasis added)].

Justice Powell's opinion for the Court in *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980), sets forth an instructive framework for analysis of the constitutionality of statutes that bear to some degree on speech. In *Consolidated Edison*, the Court struck down an order by the New York Public Service Commission that prohibited public utilities from including, with monthly bill mailings, inserts which discussed controversial issues of public policy. The order, according to the Court, directly infringed upon freedom of speech protected by the First and Fourteenth Amendments.

Justice Powell's opinion, noting that a restriction which impinges upon speech is not *per se* invalid, emphasizes that the burden to show the constitutionality of such a restriction is on the state. The opinion suggests analysis in terms of whether the restriction is a reasonable time, place or manner restriction, or whether it is a permissible subject matter regulation, or whether it is narrowly crafted to serve a compelling state interest:

> The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. (Citation omitted) We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

Consolidated Edison v. *Public Service Commission*, *supra*, 447 U.S. at 535.

I turn to such analysis of the challenged provisions.

IX.

Sections 474 and 504 are interrelated in that § 474 imposes a complete bar to the use of illustrations of money, whereas § 504 exempts from that bar illustrations which satisfy certain criteria as to size (less than three-fourths or more than one and one-half the size of currency), color (must be rendered in black and white), forum (must appear in articles, books, journals, newspapers or albums), and purpose (must be for "philatelic, numismatic, educational, historical, or newsworthy" purpose). Section 504 broadly exempts from § 474, without applying the above criteria, pictures of currency to be used for non-advertising purposes in motion pictures or television.

Because of the interrelationship of Sections 474 and 504, the ultimate constitutional analysis must be directed to the impact of these sections in tandem upon plaintiff's activities—the extent, if any, to which they prevent or deter constitutionally protected activities. Where it is alleged, as plaintiff alleges here, that threatened enforcement of provisions of law infringe upon a protected liberty, "the standard

of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised on the specific limitation imposed." *Shad* v. *Borough of Mt. Ephraim*, *supra*, 452 U.S. at 68, citing to *Thomas* v. *Collins*, 323 U.S. 516, 529-530 (1945).

Preliminary analysis of § 474 and § 504 separately will be useful in ultimate determination of their combined impact upon plaintiff's First Amendment rights.

1. Section 474

The sixth paragraph of § 474 does not enunciate a time, place or manner restriction. Time, place, and manner restrictions are geared toward *methods* of speech and seek to accommodate a particular way of expression with the safety or health interests of the community. "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 536. *See also Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977) (for sale signs); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, *supra* (pharmaceutical advertisements); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (sound trucks); *Cox* v. *New Hampshire*, *supra* (parade permits).[18]

As noted in Section VII, *supra*, in proscribing the use of illustrations of money, as symbols or otherwise, the sixth paragraph of § 474 constitutes subject-matter regulation. Subject-matter regulations encounter great difficulty passing constitutional muster in our jurisprudence, and regulations based on subject matter of speech have been approved only in narrow circumstances. Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago* v. *Mosely*, 408 U.S. 92, 95 (1972); *see Cox* v. *Louisiana*, 379 U.S. 536, 580-581 (1965) (opinion of Black, J.). "To allow a government the choice of permissible

[18] Even if the provision could be construed as a time, place or manner restriction, its concern with the subject matter of speech, i.e., the symbol of money, would violate the traditional rule that to be constitutional, time, place or manner restrictions must be applied to all speech irrespective of content. *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 536; *Carey* v. *Brown*, 447 U.S. 455, 470 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975).

subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 538.

In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Supreme Court held that the United States Government could prohibit partisan political speech on a military base even though civilian speakers had been permitted to lecture on other subjects. The exclusion was justified by the historical tradition "of keeping official military activities ... wholly free of entanglement with partisan political campaigns of any kind." *Id.* at 839. Thus the decision interpreted the public's right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.* at 842. (Powell, J., concurring).

In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (opinion of Blackmun, J.), a plurality similarly concluded that a city transit system that rented space in its buses for commercial advertisements was not under a duty to provide space for partisan political commercials. The Court gave weight to the city's fear that partisan political ads might jeopardize long-term commercial revenue and lead to accusations of favoritism. *Id.* at 304.

Both *Greer* and *Lehman* concerned the relationship of political speech to a particular governmental facility: the Court concluded that partisan political speech posed a danger to the operation of these facilities.

The flat ban on the journalistic or public use of the symbol of money cannot be equated with the *Greer* and *Lehman* cases. This case does not concern the availability of a public facility for the exercise of the free speech right by private parties. Time does not seek to use the United States Courthouse in Foley Square as a facility from which to propound its views. The sixth paragraph of § 474 cannot be upheld by reliance upon those cases that rest on the special interests of a government in operating its own property.

The sixth paragraph of § 474 does impinge on plaintiff's freedom of speech, since plaintiff has a protected right to use illustrations of money as symbols in connection with its articles (*See* Section VII, *supra*), and § 474 prohibits such use. Thus the question, as posed by Justice Powell in *Consolidated Edison*, is whether that prohibition is "a narrowly tailored means of serving a compelling state interest." 447

U.S. at 535. This court has an overriding obligation "to assess the substantiality of the justification[s] offered" and to ensure that the regulation promotes legitimate governmental ends with the minimal intrusion on First Amendment freedoms. *Village of Schaumburg* v. *Citizens for a Better Environment*, *supra*, 444 U.S. at 636; *Schad* v. *Borough of Mt. Ephraim*, *supra*, 452 U.S. at 69.

The justifications offered by defendants for the prohibitions contained in the sixth paragraph of § 474 are basically twofold. The first justification is that the prohibitions prevent counterfeiting. The second justification is that the prohibitions protect "the value [of] and respect for instruments issued as the official obligations and securities of the United States."

The government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's currency system. Is the sixth paragraph of § 474, however, a narrowly tailored means of preventing counterfeiting of United States currency? It casts its net over any and all likenesses of such currency whether or not any given likeness has the capacity to deceive or to act as a vehicle for counterfeiting. Thus it is overbroad. *Thornhill* v. *Alabama*, *supra*, 310 U.S. at 97. Where protected speech, namely the publication of illustrations of United States currency, is involved, the law must be drawn with "narrow specificity" so as to avoid any unnecessary infringement on that speech. *NAACP* v. *Button*, *supra*, 371 U.S. at 433.

That requirement is not satisfied by § 474's proscription of *all* likenesses. Neither the illustrations of money used by plaintiff nor the plates used to print those illustrations can be used to counterfeit money, or as counterfeit money.[19] To criminalize illustrations such as those employed by plaintiff that have no utility for fraud or forgery and that cannot be

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[19] Plaintiff claims, and defendant denies, that the illustrations cannot be used for counterfeiting or as counterfeit currency. Plaintiff has submitted affidavits to the effect that "the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency can be of little value to someone attempting to counterfeit a hand-engraved, two-sided dollar bill." (*See* Affidavit of Henry A. Grunwald). Common sense does not permit a contrary conclusion. Defendants do not seriously contend otherwise. Plaintiff has no objection to that part of the statute which requires that materials used to print representations of money be destroyed after their final use.

used for counterfeiting, but which do serve as vehicles for artistic or journalistic expression, violates the First Amendment by interfering unduly with protected speech. There are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse.

Defendant's second justification for the § 474 prohibitions—that they protect the value of and respect for the official obligations of the United States—is quite simply a constitutionally impermissible one. When this justification is analyzed, it can only mean that § 474 bans the use of illustrations of money because of the ideas such illustrations may symbolically represent. This runs counter to the constitutional doctrine that the government may neither prohibit nor prescribe the form or content of individual expression, absent a compelling state interest. *Police Department of the City of Chicago* v. *Mosley*, *supra*, 408 U.S. at 95, 98. The government cannot compel or prohibit respect for any symbol or idea in this country. *Stromberg* v. *California*, 283 U.S. 359 (1931) (state prohibition of display of red flag struck down); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (mandatory salute of the American flag invalidated); *Street* v. *New York*, 394 U.S. 576 (1969) (conviction for "disrespectful" language about the flag set aside); *Schacht* v. *United States*, 398 U.S. 58 (1970) (punishment for theatrical use of a uniform which was critical of the Army invalidated). Neither plaintiff nor any citizen can be compelled by the government to pay respect to the dollar. The sixth paragraph of § 474 cannot be justified as protecting, by restraining speech, "the value [of] and respect for" currency issued by the government.[20]

In *Wagner* v. *Simon*, 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976), plaintiff sought a declaratory judgment that the sixth paragraph of § 474 had been unconstitutionally applied to a 36" x 15" reproduction he had made in the likeness of a twenty dollar federal reserve note with substantial modifications. These modifications included, *inter alia*, changing the picture of President Jackson to President Nixon, replacing the words "Federal Reserve Note" with the words "Inflationary Note,"

[20] This second justification so clearly presents an impermissible state interest that it is not necessary to determine, with respect to it, whether a less intrusive approach would be possible.

substituting "Thirty" for "Twenty", and drawing a teapot in place of the Federal Reserve seal. The finished product was intended as a political statement critical of President Nixon's economic policies and his involvement in the "Watergate" affair.

The district court held that the poster fell within the specific proscriptions of the sixth paragraph of § 474 and that the provision was not overbroad. The sixth paragraph of § 474 was, the court held, "aimed only at the suppression of the non-communicative conduct within its scope," and was "an appropriately narrow means of protecting a substantial governmental interest" which did "not necessarily interfere with First Amendment rights." 412 F. Supp. at 432.

Wagner arose in a factual context that distinguishes it from the instant case. First, the plaintiff in *Wagner* wanted to sell his product, a commercial aspect not present here, although Time is in the publishing business for a profit. Second, *Wagner* involved an individual artist; this case involves a plaintiff which is a member of the press and which makes the argument that illustrations of currency are vitally necessary to the dissemination of news. No such argument was asserted in *Wagner*. As Justice Holmes once observed, "[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." *Quong Wing* v. *Kirkendall*, 223 U.S. 59, 64 (1912).

In any event, the *Wagner* district court did not engage in the analytical process now called for by *Consolidated Edison*, *Schad*, *Grayned* and other free speech/free press cases.[21] It did not examine the statute, assess its justifications, nor probe its nexus to the governmental interest purported to be served by it. It did not even indicate whether Wagner's work had any First Amendment protection. I decline to follow it.

2) Section 504

Although the prohibitions in § 474 do not withstand constitutional scrutiny, it is necessary to examine § 504, since if its provisions permitted what § 474 prohibits, a constitutional confrontation would be avoided.

Insofar as plaintiff's illustrations are concerned, Section 504 leaves in place the § 474 proscriptions, and in the

[21] Of these cases, only *Grayned* had been decided at the time of the *Wagner* decision.

course of various of the warnings with respect to plaintiff's violations of law, government representatives have invoked § 504 (*see* pp. 10-16, *supra*). Be that as it may, § 504 presents troublesome constitutional problems of its own.

Section 504 allows black and white illustrations of United States currency less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter illustrated, appearing in articles, books, journals, newspapers or albums for philatelic, numismatic, educational, historical or newsworthy purposes. Thus § 504 draws lines: it is a time, place and manner regulation that creates distinctions among illustrations of currency based on criteria pertaining to content, purpose, and forum in which the illustration appears. Section 504 must meet the constitutional standard for time, place or manner regulations: it is to be applied to all speech irrespective of content. *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 536; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

Section 504's concern with "philatelic, numismatic, educational, historical, or newsworthy" purposes is constitutionally impermissible. Governmental action that regulates speech on the basis of its subject matter "'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" *Police Department of the City of Chicago* v. *Mosley*, *supra*, 408 U.S. at 99, quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29. In enforcing § 504, the government decides whether the purpose of the illustration is "philatelic, numismatic, educational, historical or newsworthy" and whether the forum in which it appears is indeed an article, a book, a journal, a newspaper or an album. Such decisions are based on content or subject matter. Succinctly put, § 504 requires judgments about the nature and quality of the message contained in the illustration, about the nature and quality of the article to which the illustration relates, and about the nature of the forum containing the illustration, types of judgment the First Amendment prohibits the government from making. *Cohen* v. *California*, 403 U.S. 15, 24 (1971); *Thornhill* v. *Alabama*, *supra*.

In *Village of Schaumburg* v. *Citizens for a Better Environment*, *supra*, a municipal ordinance required charitable organizations which desired to raise money in house-to-house solicitation to demonstrate that at least 75% of the

receipts would go to charitable purposes. 444 U.S. at 624. Plaintiff, a charitable organization, sued to invalidate the ordinance on the ground that it was overbroad because it barred advocacy-oriented causes whose receipts of contributions were used for salaries and organizational costs, not charitable purposes.

The United States Supreme Court agreed with plaintiff's contention that the statute bore little relation to its goal of preventing fraud or crime and constituted too great an intrusion on plaintiff's free speech right. 444 U.S. at 636. The 75% requirement was perceived to bear heavily on freedom of speech and could only be countenanced if it enjoyed a significant relationship to substantial governmental interests. *Id.* Finding these interests substantial, the Court nonetheless found that they were only peripherally served by the ordinance and could be served by a more narrowly drawn law. *Id.*

Village of Schaumburg demands a tight nexus between the requirements of a statute and the promotion of the governmental goals, especially where a constitutional right is implicated. *Id.* at 639. Such a nexus is missing here. There is no relationship between the distinctions among the purposes and forums, and the evils that the statute purportedly targets. Will an illustration in a numismatic journal be any less susceptible to forgery than one appearing in *Playboy*? Will a newsworthy illustration of money in a book be any less susceptible to forgery than a non-newsworthy item? Indeed, the newsworthiness of an illustration has no bearing on its capacity (or lack thereof) to deceive a person or to facilitate a criminal's attempt at forgery. Neither the purpose to which an illustration is put nor the forum in which it appears has any relation to the prevention of counterfeiting. The federal statutory scheme evidenced in § 504 is insufficiently related to the governmental interests it seeks to promote to justify intrusion on protected speech.

Just as an organization which spends more than 25% of its receipts for non-charitable purposes is no more likely to commit fraud or crime than an organization spending less than 25% of its receipts for non-charitable purposes, the illustrations banned by the provisions under challenge here are no more likely to threaten the public welfare than those arbitrarily allowed. As a charity's ability to fulfill the 75% requirement bears no relationship to the likelihood of its solicitors to commit fraud or crime, the newsworthiness or

educational value of an illustration, or the forum in which it appears, has little to do with its capacity to defraud the public.

As an exception to the absolute prohibitions of § 474, the lines drawn by § 504 do not directly promote the government's interest in preventing counterfeiting through the least restrictive means, and they intrude unnecessarily upon plaintiff's freedom of speech. *Shelton* v. *Tucker*, *supra*, 364 U.S. at 488.[22]

Hynes v. *Oradell*, *supra*, teaches that a law which fails to inform the public how to conform, and which fails to provide narrow, specific standards for those officials who must apply it, is void for vagueness. 425 U.S. at 622. Thus there is also a problem of vagueness with § 504. The determination of what is "philatelic, numismatic, educational, historical, or newsworthy" is rife with assumption and open to varying interpretation. The definition of a journal, newspaper or album is anyone's game to play. It has been long recognized that time, place, and manner regulations which vest in law enforcement authorities the capacity for discretionary enforcement or subjective definition of an offense are instruments for censorship.[23] *Lovell* v. *Griffin*, 303

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[22] Section 504 also suffers from both under-inclusiveness and over-inclusiveness. It is under-inclusive in that it exempts the broadcast media. It is over-inclusive in that its prohibition bans the finished product irrespective of its ability to perpetrate fraud or crime as well as the plates and the negatives, more likely raw materials for counterfeiting currency. This under- and over-inclusivity indicates a failure to be "a narrowly tailored means of serving a compelling state interest." *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 535.

[23] The vice of vagueness is starkly illustrated by the two additional requirements which have been communicated to plaintiff by agents of the Treasury Department. *See* fn. 9, *supra*.

Not only must an illustration meet each and every one of the criteria set out in Section 504: it must also "be accompanied by numismatic, educational, historical, or newsworthy information relating directly to the item that is illustrated." This requirement shrinks Section 504's exceptions from Section 474's prohibitions to the vanishing point: even if an illustration were to meet all of Section 504's criteria, it would still be illegal if it did not relate to the specific piece of currency so illustrated. Not only does that additional requirement have no bearing on the asserted goal of preventing forgery but it also represents a Governmental attempt to dictate the contents of a message, implicating immediate and close constitutional scrutiny. *See Shelton* v. *Tucker*, *supra*.

U.S. 444, 452 (1938); *Heffron* v. *ISKCON*, 452 U.S. 640 (1981).

The distinctions drawn by § 504 do not clearly delineate the area of forbidden conduct, which forces the public to guess at its essential meaning in violation of due process of law. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Hynes* v. *Mayor of Oradell*, *supra*, 425 U.S. at 620. This operates to produce a chilling effect on speech, a vice condemned by the First Amendment. *Smith* v. *California*, 361 U.S. 147 (1959); *Gooding* v. *Wilson*, *supra*.

X.

The original version of the sixth paragraph of § 474 was drafted in 1864 as a financial measure to assure the availability of funds for the War Between the States. In the meantime, technology has come a long way and this case represents a clash between an old law and the needs of modern society. Nowadays, if someone is going to counterfeit money, he or she has far more efficient and direct ways of doing the job than relying on Time's illustrations, all of which are distorted.

There is no material issue of fact. I find that the sixth paragraph of 18 U.S.C. § 474, and 18 U.S.C. § 504, are unconstitutional on their face and as applied to plaintiff. Plaintiff is entitled to judgment as a matter of law on its motion for summary judgment. Defendant's cross-motion for summary judgment is denied. A declaratory judgment to that effect shall be entered.[24]

The second requirement put forth by Treasury insists that "decorative or eye-catching" illustrations are not allowed. A front cover illustration that meets all § 504 criteria but is eye-catching would be banned. The questions to ask are: what is "eye catching"? Who determines that issue? What does "eye-catching" have to do with the prevention of forgery?

Section 504 by its terms does not require that illustrations be accompanied by information relating to the item illustrated, nor does it require that the illustration not be eye-catching. The Treasury Department's position, thus, highlights the variance to which interpretation of the law is subject. The absurdity is compounded by the fact that there are very few currency notes in or out of circulation that would provide the basis for a news story.

[24] Since a declaratory judgment is to be entered, and defendants will be bound by that judgment, I see no reason to enjoin defendants. *Poe* v. *Gerstein*, 417 U.S. 281 (1974); *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-485 (1965).

Submit judgment.

/s/ VINCENT L. BRODERICK

VINCENT L. BRODERICK,
U.S.D.J.

Dated: New York, New York
June 4, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

81 Civ. 3218 (VLB)

TIME INC., PLAINTIFF,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York, DEFENDANTS.

[Filed June 18, 1982]

ORDER AND JUDGMENT

Plaintiff Time Incorporated having commenced an action for (1) a judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* declaring that Tit. 18, U.S.C. § 474 ¶ 6 (1976) and Tit. 18, U.S.C. § 504 (1976) are unconstitutional and null and void on their face and as applied to plaintiff in that they are overbroad, impermissibly infringe constitutionally secured freedoms of speech and of the press, are impermissibly vague, and impermissibly distinguish lawful from unlawful speech on grounds prohibited by the First and Fourteenth Amendments of the United States Constitution, and for (2) a permanent injunction pursuant to Fed. R. Civ. P. 65 restraining and enjoining defendants, their agents, and all persons subject to their direction and control from enforcing or threatening to enforce said statutes; and plaintiff and defendants having cross-moved this Court for summary judgment pursuant to Fed. R. Civ. P. 56, and after due deliberation thereon and upon the opinion of this Court dated June 4, 1982, it is

ORDERED that plaintiff is entitled to judgment as a matter of law and plaintiff's motion for summary judgment is granted, and defendants' motion for summary judgment is denied, and it is further

ORDERED, ADJUDGED AND DECREED that the sixth paragraph of 18 U.S.C. § 474 (1976), and 18 U.S.C. § 504 (1976), are unconstitutional on their face and as applied to plaintiff, Time Incorporated, Time & Life Building, Rockefeller Center, New York, N.Y. 10020, and it is further

ORDERED that plaintiff shall recover costs and disbursements from defendants in an amount to be taxed by the Clerk of this Court.

Dated: New York, N.Y.,
June 16, 1982.

/s/ VINCENT L. BRODERICK
U.S.D.J.

[Judgment Entered 6/18/82

/s/ RAYMOND F. BURGHARDT
Clerk]

[A True Copy
RAYMOND F. BURGHARDT, Clerk

By /s/ WILLIAM MILLIGAN
Deputy Clerk]

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

81 Civ. 3218 (VLB)

TIME, INC., PLAINTIFF,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States; JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service; JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York, DEFENDANTS

NOTICE OF APPEAL

SIRS:

NOTICE IS HEREBY GIVEN that Donald T. Regan, H. Stuart Knight, William French Smith, James R. D'Amelio and John S. Martin, Jr., defendants above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on the 18th day of June, 1982. Appeal is taken to the Supreme Court pursuant to 28 U.S.C. § 1252.

Dated: New York, New York
July 16, 1982

Yours, etc.,

JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York,
Attorney for Defendants

by: /s/ TWILA L. PERRY

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TO: CLERK OF THE SUPREME COURT OF THE UNITED STATES
United States Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

APPENDIX D

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

July 19, 1982

Dear Mr. Chairman:

Enclosed are 35 copies of my statement for the record which sets forth the position of the Department of the Treasury on H.R. 4275, a bill to amend section 504 of title 18, United States Code. As we previously advised the Subcommittee's counsel, the status of the laws limiting the reproduction of likenesses of United States currency is presently before the Federal courts. An initial District Court ruling broadly struck down a number of restrictions on such reproduction, but that ruling is subject to appeal and eventual possible review in the Supreme Court.

Under these circumstances, we believe that it would be premature and inappropriate for the Treasury Department to engage at this time in a public colloquy on the laws governing reproduction of U.S. currency; and, therefore, we must decline to provide a witness at any current hearings on this subject.

We also believe, however, that Treasury's views on the merits of the proposed bill, H.R. 4275, may be presented for consideration by the Congress without impairing any future legal positions of the United States. Consequently, I

would very much appreciate your including a copy of my statement in the report accompanying the Subcommittee's action on this bill.

Sincerely,

(Signed)

Robert E. Powis
Deputy Assistant Secretary
(Enforcement)

The Honorable
John Conyers, Jr., Chairman
Subcommittee on Criminal Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

cc: The Honorable Robert McClory
Enclosure

STATEMENT OF THE HONORABLE ROBERT E. POWIS DEPUTY ASSISTANT SECRETARY OF THE TREASURY (ENFORCEMENT) BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE HOUSE JUDICIARY COMMITTEE ON H.R. 4275

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to provide the views of the Department of the Treasury on H.R. 4275, a bill which would amend section 504 of title 18, United States Code, to modify the restrictions placed upon the publishing of certain Government instruments, particularly U.S. currency. Since enactment of this proposal would adversely impact upon the counterfeiting suppression efforts of the U.S. Secret Service, we believe that it is important to convey our concerns to the Subcommittee.

Under present law, section 504 provides exceptions to the anticounterfeiting statutes found in the criminal code. The requirements of section 504 are met if the purpose of the reproduction is philatelic, numismatic, newsworthy, educational or historical and if the illustration is in black and white, meets the size restriction, and is located within a book, album, journal, etc. H.R. 4275 would amend section 504 by permitting the reproduction of United States obligations and securities and certain other instruments for advertising purposes. In addition, the color restrictions would be dropped, thereby permitting color illustrations when the remaining criteria of section 504 are met.

Representative McClory introduced the bill by stating that it would relieve the unnecessary burdens which have been placed upon legitimate publishers. The argument offered to support the abolition of these restrictions is as follows:

18 U.S.C. 504 was enacted at a time when quality publishing was the domain of comparatively few highly skilled professionals. Because of the danger of counterfeiting, it was necessary to restrict the kinds of plates that these skilled printers could manufacture.

But now to continue to prohibit color reproduction of monetary instruments by legitimate publishers fails to recognize that times have changed. Quality publishing is by and large in color and no longer an elite technology. With its skills in such wide circulation, a restriction against color reproduction is a burden only on the legitimate, law-abiding printer.

The Treasury Department draws a quite different conclusion from those statements; and, indeed, we find that they form a good foundation upon which to base our objection to this proposal. The very fact that the technology is so advanced and quality printing is so widespread makes the suppression of counterfeiting activities all the more difficult. Counterfeiters, like printers, have benefited from today's advanced technology. In both instances, the "elite technology" has been replaced by the photomechanical process.

It is important that the legitimate possession of negatives of United States currency be held to an absolute minimum. Although plates and negatives may be created for a legitimate purpose, their relative availability tempts individuals to use them for counterfeiting purposes. Press and photo lab technicians have perfected negatives under the guise of an advertisement project or even while actually working on a legitimate job, while others have had their interest sparked by discovering the ease with which a note can be counterfeited. The following actual cases, which have been investigated by the Secret Service, illustrate these points.

Case Number One

On May 5, 1982, agents of the San Francisco Office suppressed a counterfeiting plant at a print shop in Newark, California. Seized were plates, negatives, offset press, plate makers, paper cutter, and approximately $5,000 in uncut and unfinished counterfeit $20 Federal Reserve Notes.

On May 20, 1982, one of the defendants in this case gave a statement and advised that prior to his arrest, he had been contacted to print casino coupons bearing the partial image of genuine U.S. currency.

The subject further stated that when this reproduction job fell through, he then began to counterfeit currency for distribution and passing purposes, using the negatives which had originally been prepared to manufacture the casino coupon flash notes.

Case Number Two

On February 6, 1976, agents of our New York City Field Office discovered a flash note operation in a legitimate print shop. Prosecution was declined due to lack of criminal intent, since the operation only involved reproductions.

On November 15, 1977, the same individual was arrested in Brooklyn, New York, subsequent to a two-month investigation for manufacturing and delivering $30,100 in counterfeit $50 Federal Reserve Notes. In excess of $2,000,000 in counterfeit FRN's were seized incident to that arrest.

Case Number Three

On July 25, 1974, agents of the Tulsa, Oklahoma, Resident Office personally interviewed the owner and operator of a legitimate print shop concerning the manufacture of flash notes. The owner readily admitted that he had manufactured and printed 1,000, $10 flash notes. He surrendered the negatives and two uncut sheets of flash notes.

On October 10, 1979, the same individual was arrested in Tulsa, Oklahoma, by agents for possession of $1,280,680 in counterfeit $20 and $100 Federal Reserve Notes. Defendant readily admitted being the printer of the subject notes which were manufactured at this print shop.

Case Number Four

On February 8, 1980, defendant was sentenced in U.S. District Court (Northern District of California) to five years in prison for manufacturing approximately $80,000 in counterfeit $100 Federal Reserve Notes. Prior to sentencing, defendant gave a statement to

> Secret Service agents advising that following his release from prison in 1976, he set up a legitimate printing operation in his mother's garage in San Jose, California. During this period, he happened to be in a flea market in San Jose and purchased an oversized $100 flash note. His original intentions were to reproduce and sell the flash note; however, after experimenting, he decided to counterfeit currency for the purpose of distribution and passing.

Broadening the statutory exceptions to permit reproductions for general advertising will certainly make counterfeiting crimes easier for the criminal who associates himself with a legitimate print shop. An instant alibi will be created for manufacturing and possessing currency negatives, particularly if color illustrations are allowed as suggested in this proposal.

Furthermore, permitting the use of color illustrations would provide justification for possessing separate plates and negatives of the note, Treasury seals and serial numbers. This color separation process is a crucial step towards counterfeiting obligations. Under current law, only black and white illustrations are permissible; and therefore, only one negative in the printing process is required. Dropping the black and white restriction brings the legitimate printers a few steps closer to an actual counterfeiting operation.

It is noted that H.R. 4275 would continue to prohibit actual size reproductions. Although this would safeguard against the circulation of the actual reproduction, it would not allay our concerns regarding the proliferation of more serious counterfeiting activities. The size restriction alone does not address the problem of widespread possession of color separation negatives, nor does it impact upon the availability of a ready-made alibi for the possessors.

While the Department opposes H.R. 4275 for the above stated reasons, we are sympathetic to the concerns of legitimate printers and advertisers who want to abide by the law yet promote their financial interests. Although we would like to endorse a proposal which can accomodate these interests, the Department cannot do so at the expense of law enforcement efforts to protect the integrity of

our national currency. H.R. 4275 does not appear to be the appropriate vehicle to mesh the two interests in a way that can be supported by the Department.

Furthermore, the status of the laws limiting the reproduction of likenesses of United States currency is presently before the Federal courts. An initial District Court ruling broadly struck down a number of restrictions on such reproduction, but that ruling is subject to appeal and eventual possible review in the Supreme Court.

Under these circumstances, the Treasury Department is of the view that considering legislation at this time would be premature. Should the District Court ruling, with its constitutional implications, be sustained on appeal, it is not unlikely that more narrowly drawn legislation would also be declared infirm. Should the lower court's decision be overturned in part or in full, it is impossible to say today whether or not section 504 would require legislative alteration and whether or not H.R. 4275 would be the appropriate alternative.

In short, legislation at this time may turn into a fruitless exercise, and could produce unintended and undesirable results when it and the pending litigation are viewed with the widsom of hindsight.

Office - Supreme Court, U.S.
FILED
MAY 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-729

IN THE

Supreme Court of the United States

October Term, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.*,

Appellants,

v.

TIME INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 27, 1982
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1983

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RELEVANT DISTRICT COURT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

---

81 Civ. 3218 (VLB)

May 27, 1981	Complaint filed, summons issued (summons served on all defendants May 29, 1981; filed June 1, 1981).
July 21, 1981	Plaintiff's Notice of Motion for Summary Judgment, *with* Plaintiff's Statement Pursuant to Civil Rule 3(g), Affidavit of Frederick A. O. Schwarz, Jr., Plaintiff's Memorandum of Law, and Affidavits of Editors and Art Directors of Time Incorporated in support of motion.
August 19, 1981	Answer filed.
August 28, 1981	Amended Answer filed.

September 11, 1981	Defendants' Notice of Motion for Summary Judgment, *with* Defendants' Rule 3(g) Statement and Response to Plaintiff's Rule 3(g) Statement, and Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment.
September 29, 1981	Supplemental Memorandum in Support of Plaintiff's Motion for Summary Judgment, *with* Supplemental Affidavit of Frederick A. O. Schwarz, Jr. in support of motion.
October 15, 1981	Plaintiff's Response to Defendants' Statement Pursuant to Rule 3(g), *with* Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment.
June 4, 1982	Opinion (Broderick, J.): Plaintiff is entitled to judgment as a matter of law on its motion for summary judgment. Defendants' cross-motion for summary judgment is denied. A declaratory judgment to that effect shall be entered.
June 18, 1982	Order and Judgment (Broderick, J.).
July 16, 1982	Defendants' Notice of Appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §1252.
March 1, 1983	Order of Supreme Court of the United States noting probable jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York,

Defendants.

---

81 Civ. 3218 (VLB)

COMPLAINT

(filed May 27, 1981)

Plaintiff, for its Complaint herein, avers:

Jurisdiction

1. This is a civil action seeking declaratory and injunctive relief to vindicate and to safeguard rights of freedom of speech and of the press secured by the First Amendment of the United States Constitution. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and the Constitution of the United

States. The amount in controversy, exclusive of interest and costs, exceeds $10,000. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

Parties

2. Plaintiff TIME INC. publishes periodical magazines called TIME, FORTUNE, SPORTS ILLUSTRATED, LIFE, MONEY, PEOPLE, and DISCOVER. The magazines FORTUNE and MONEY deal especially with matters pertaining to finance and the economy, and all of the magazines published by plaintiff report from time to time on the economy, financial issues, payments of money both legitimate and suspect, corporate and personal wealth, and other money-related matters. Plaintiff is incorporated under the laws of the State of New York and has its principal place of business at 1271 Avenue of the Americas, New York, New York.

3. Defendant DONALD T. REGAN, sued only in his official capacity, is Secretary of the United States Department of the Treasury. In that capacity he is reponsible for the administration of the Department, including its activities relating to the enforcement of the laws of the United States which define and provide for the punishment of counterfeiting and forgery of the currency.

4. Defendant H. STUART KNIGHT, sued only in his official capacity, is the Director of the United States Secret Service, a division of the Department of the Treasury. In that capacity he is responsible for the administration of the Secret Service, including the discharge of its authority to detect and arrest any person committing an act proscribed by the laws of the United States relating to the currency.

5. Defendant WILLIAM FRENCH SMITH, sued only in his official capacity, is the Attorney General of the United States. In that capacity he is responsible for the administration of the United States Department of Justice, including its activities relating to the enforcement of the penal laws of the United States.

6. Defendant JAMES R. D'AMELIO, sued only in his official capacity, is Special Agent in Charge of the New York Field Office of the United States Secret Service.

7. Defendant JOHN S. MARTIN, JR., sued only in his official capacity, is the United States Attorney for the Southern District of New York.

The Uses of Currency Illustrations in the Communication of News and Ideas

8. In the editorial judgment of the editors and art directors of plaintiff TIME INC., there is often no simpler or more effective means of conveying information, opinions and ideas concerning a wide range of issues of vital public interest, or of commenting upon events, than through the use of photographs and artwork which depict illustrations of currency. Freedom to use such illustrations is important to the journalists responsible for the selection and preparation of the editorial content of plaintiff's magazines.

9. Within the past decade, plaintiff's magazines have utilized photographs and artwork depicting illustrations of currency, *inter alia*, to symbolize the toll of inflation, to represent the economic issues at stake in an election for the President of the United States, to comment upon political scandals, and to convey information or commentary upon matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in amateur basketball. Recent uses of currency illustrations in plaintiff's magazines include, but are not limited to, the following examples, each of which by definition appeared on one side of a page only:

(a) A photographic reproduction in color of approximately one-quarter of the face of a $1 Federal Reserve Note, photographically enlarged to approximately five times actual size and obscured in substantial part by printed legends. This reproduction appeared on the cover

of the December 14, 1970, issue of TIME, and illustrated a story about inflation appearing at pp. 82-90 in that issue of the magazine. A copy of that cover is attached to this Complaint as Exhibit A.

(b) A photographic reproduction in black and white of approximately one-half of the face of a $1 Federal Reserve Note, substantially obscured by an overlaid picture of a life preserver. This reproduction appeared on page 43 of the July 29, 1974, issue of TIME, and illustrated an accompanying essay captioned, "How to Mobilize Against Inflation". A copy of that page is attached to this Complaint as Exhibit B.

(c) A photographic reproduction in black and white of a $1000 Federal Reserve Note, substantially obscured by an overlaid printed legend and by an overlaid graphic design. This reproduction appeared on the cover of the February 23, 1976, issue of TIME, and illustrated a story appearing at pp. 28-36 in that issue of the magazine about alleged international bribery by an American aircraft firm. A copy of that cover is attached to this Complaint as Exhibit C.

(d) A photographic reproduction in color of $1, $10 and $20 Federal Reserve Notes clutched in a human hand. The Notes shown were folded lengthwise, and photographically reduced to a scale less than one-half actual size. With respect to most of the photographed Notes, only a part of an outside border, or the border and a fragment of a single numeral, were visible. With respect to a single $10 Note, two larger portions were visible, but none equal to as much as one inch square. This reproduction appeared on the cover of the November 1, 1976, issue of TIME above the legend "Voting Your Pocketbook", and illustrated a story appearing at pp. 18-22 in that issue of the magazine about an impending election of the President of the United States. A copy of that cover is attached to this Complaint as Exhibit D.

(e) A photographic reproduction in color of Federal Reserve Notes enclosed within a money clip. The Notes shown were folded twice widthwise, and photographically enlarged to more than twice their actual size. With respect to most of the photographed Notes, only fragments of an outside border were visible. With respect to a single $1000 Note, approximately one-third of the reverse side was visible, substantially obscured by the overlaid money clip. This reproduction appeared on the cover of the February 12, 1979, issue of FORTUNE, and illustrated a story on "America's Invisible Rich" appearing at pp. 92-104 of that issue of the magazine. A copy of that cover is attached to this Complaint as Exhibit E.

(f) A photographic reproduction in color of $100 Federal Reserve Notes stuffed inside or descending into a basketball hoop and attached net. The Notes shown were photographically reduced to a scale approximately one-third actual size, and each was visible only in part; most were substantially obscured by overlaid portions of other Notes in the photograph, by the basketball hoop or net, or by an overlaid printed legend. This reproduction appeared on the cover of the February 16, 1981, issue of SPORTS ILLUSTRATED beneath the caption, "Anatomy of a Scandal", and illustrated a story appearing at pp. 14-21 in that issue of the magazine about a "point-shaving" scheme in amateur basketball. A copy of that cover is attached to this Complaint as Exhibit F.

The Prohibition of Currency Illustration Under Federal Law

10. Chapter 25 of Title 18 of the United States Code is a penal statute intended to prevent and to provide for the punishment of alteration, counterfeiting or forgery of the coins, obligations, securities and other official documents of the United States Government and of foreign governments. Title 18, U.S.C. § 474, one of thirty-nine sections in that statute, is captioned "Plates or stones for counterfeiting obligations or

securities". Paragraphs 1st through 5th and paragraph 7th of § 474 prohibit unauthorized possession, use, importation, sale and forgery of materials which can actually be employed for counterfeiting purposes, such as plates, stones and paper used for the printing of United States obligations. However, paragraph 6th of § 474 provides:

> "Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security [of the United States], or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

11. On its face and as interpreted by defendants, paragraph 6th of Title 18, U.S.C. § 474 absolutely prohibits the printing or publication for any purpose of any photograph, print or other impression in the likeness of any portion of any specimen of United States currency. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies whether a likeness of currency is good or bad; whether or not it is susceptible of being confused for genuine currency; and whether or not it is capable of being used in any manner in a counterfeiting or forgery scheme, however fanciful or improbable. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies whether the likeness is true to the actual size of currency, or substantially enlarged or reduced; whether it is faithful to the true color and appearance of currency, or substantially discolored or recolored, distorted, obscured, or modified; whether it depicts a substantial fraction of any specimen of currency, or but the smallest fragment thereof; and whether it is printed or impressed upon a substance which resembles the appearance and consistency of United States currency, or upon any other substance, be it tissue

paper, glossy paper, or eggshell. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies even if a likeness of currency appears on only one side of a page. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies whether a likeness of currency is executed for artistic purposes, for the expression of political or economic opinion, for the communication of information and ideas, or for the purpose of counterfeiting or forgery.

12. On its face and as interpreted by defendants, Title 18, U.S.C. § 474 ¶ 6 absolutely prohibits plaintiff from conveying information, opinions or ideas to its readers, or commenting upon public affairs, through the use of any photographs or artwork in the likeness of any portion of any specimen of United States currency. For the violation of this prohibition plaintiff's publisher and editors risk arrest and prosecution, and plaintiff risks forfeiture of all copies of a publication in which such an illustration appears, as well as forfeiture of all material and apparatus used or fitted or intended to be used in the making of such an illustration.

13. Title 18, U.S.C. § 504 carves out from the proscriptions of § 474 ¶ 6 an exemption for the printing or publishing of illustrations of United States currency which (a) are in black and white; (b) are of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated; (c) appear in articles, books, journals, newspapers or albums; and (d) are for ". . . numismatic, educational, historical, or newsworthy purposes." The printing or publication of any likeness of currency which fails to satisfy all of these requirements is barred by § 474 ¶ 6.

14. The definitions of "illustrations" and of "numismatic, educational, historical, or newsworthy purposes" within the meaning of § 504 are not set forth in that provision or any other provision of Title 18, U.S.C. The exposure of plaintiff and others to the risk of the sanctions described in ¶ 12 above therefore turns upon the personal judgments of defendants and their agents and employees as to the nature and purposes of the illustrations that should be deemed to satisfy the statutory

standard. In addition, defendants' construction of the statute to date substantially extends the sweep of its prohibitions. Thus, as of the date of this Complaint, agents and employees of defendants REGAN, KNIGHT and D'AMELIO have advised plaintiff that in the opinion of the Department of the Treasury, § 504 prohibits illustrations "used primarily for decorative or eye-catching purposes", and also requires that an illustration otherwise permitted by that section "be accompanied by numismatic, educational, historical or newsworthy information *relating directly to the item that is illustrated.*" (emphasis supplied)

15. With respect to each of the currency illustrations in plaintiff's magazines specifically described in subparagraphs (a) through (f) of ¶ 9 above and attached hereto, and with respect to other, similar photographs and artwork not here specifically described, plaintiff was advised by agents or employees of defendants KNIGHT and D'AMELIO, or of their predecessors, that in the opinion of the Department of the Treasury, the illustration failed to satisfy the requirements for the exemption conferred by Title 18, U.S.C. § 504, and therefore violated Title 18, § 474. Plaintiff has been repeatedly warned to cease and desist from further use of photographs and artwork in its magazines depicting likenesses of currency except as provided by the terms of § 504, and threatened with prosecution if it fails to do so.

Causes of Action

16. Title 18, U.S.C. § 474 ¶ 6 on its face violates the First Amendment of the United States Constitution in that it is unconstitutionally overbroad. Section 474 ¶ 6 broadly and indiscriminately sweeps within its prohibitions constitutionally protected rights of freedom of speech and of the press, and abridges and chills the exercise of protected speech by plaintiff and others.

17. On their face and as applied, Title 18, U.S.C. § 474 ¶ 6 and § 504 violate the First Amendment of the United States

Constitution, in that (a) they absolutely prohibit speech which poses no danger to the realization of the governmental interest in prevention of counterfeiting and forgery of the currency; and (b) are not drawn with narrow specificity to further the governmental interest in prevention of counterfeiting and forgery of the currency by means that directly advance their legitimate ends, and avoid unnecessary intrusion upon constitutionally secured freedoms of speech and of the press.

18. On its face and as applied, Title 18, U.S.C. § 504 violates the First Amendment of the United States Constitution, in that it purports to distinguish lawful from unlawful speech on the basis of a judgment by the Government as to the nature and content of speech which serves ". . . educational, historical or newsworthy purposes". The statute is unconstitutionally vague; unconstitutionally abridges the right of editors and publishers to exercise editorial control and judgment over the content of the material in their publications; and unconstitutionally regulates speech on the basis of its content pursuant to a test of lawfulness that is not related, remotely or at all, to any compelling governmental interest.

19. Plaintiff has no adequate remedy at law.

Prayer for Relief

WHEREFORE plaintiff respectfully prays judgment against defendants as follows:

(a) declaring that Title 18, U.S.C. § 474 ¶ 6 and § 504 are null and void on their face and as applied to plaintiff;

(b) restraining and enjoining defendants, their successors, their agents and all persons subject to their direction and control, from in any way enforcing or threatening to enforce said statutes; and

(c) such other and further relief as this Court may deem just and proper.

May 27, 1981

CRAVATH, SWAINE & MOORE

by /s/ FREDERICK A. O. SCHWARZ, JR.

Frederick A. O. Schwarz, Jr.
A member of the firm

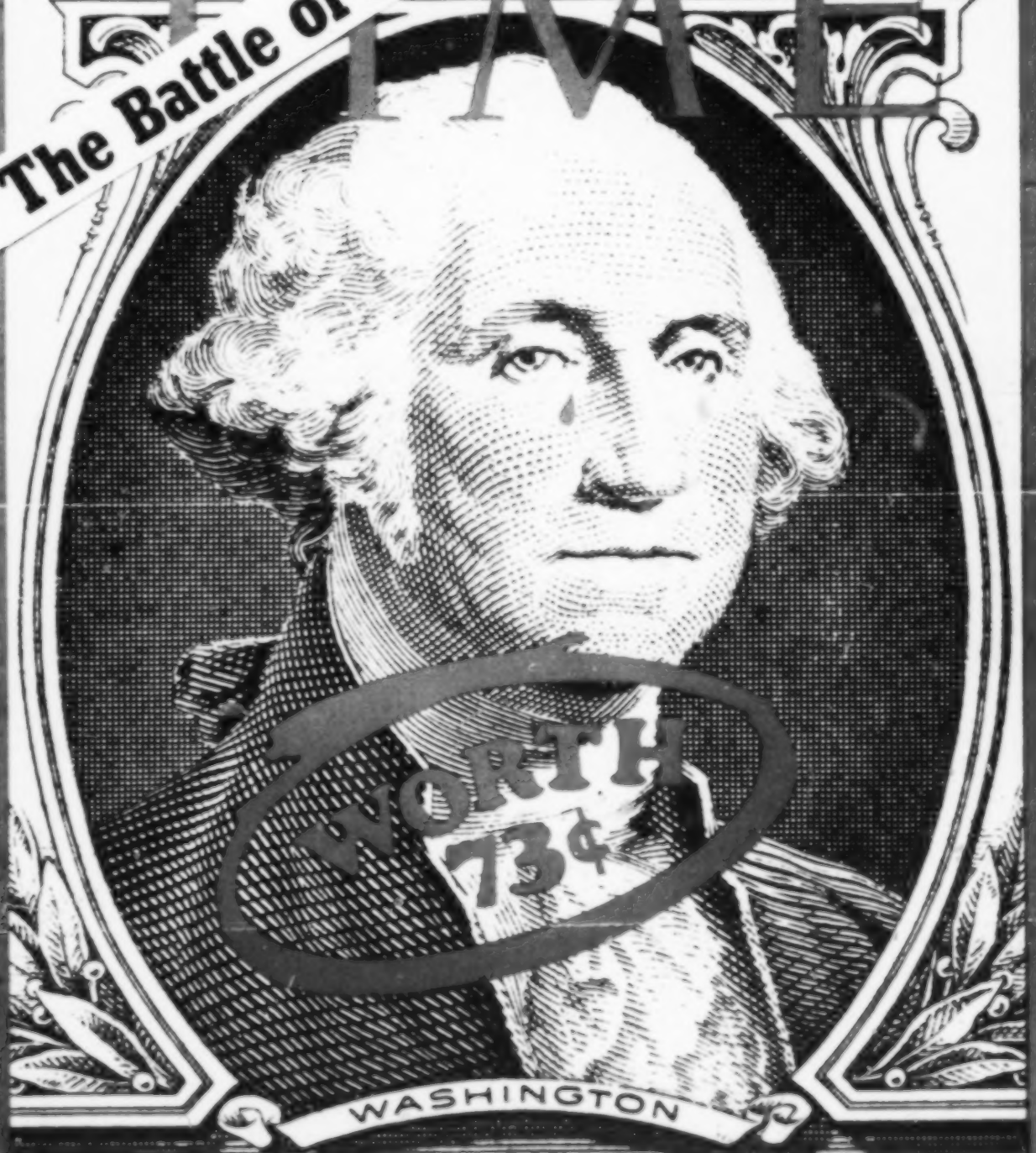
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

[Affidavit of Service omitted in printing.]

FIFTY CENTS DECEMBER 14, 1970

TIME

The Battle of the Buck



How to Mobilize Against Inflation

Inflation may be becoming to the 1970s what depression was to the 1930s—not only an economic agony but a crisis that threatens the stability of society. Like the Great Depression four decades ago, today's Great Inflation has struck a blow at Americans' usual optimism about the future and replaced it with a deep worry—about whether families will be able to afford travel, comfortable housing, quality education for their children, even the foods they like best.

Millions of people justifiably feel that the economy is cheating them of the rewards of hard work and thrift. A few more years of skyrocketing prices that wipe out much of the middle class and reduce some Americans to eating dog food could well cause many voters to question whether a system so fundamentally flawed can endure.

The public demoralization is being vastly increased by a gnawing fear that no one knows how to stop inflation in a modern democratic capitalist economy. The Government swings erratically from price controls to a free market, from budget stimulation to budget cutting, from easy money to tight money; nothing seems to work for long. Economists discussing anti-inflation strategy have rarely been so modest and tentative; several seem confident only in proclaiming that their colleagues' ideas will not work.

Modesty is advisable: inflation is in fact the most torturingly complex problem of modern economics. It seems inextricably bound up with growth and high employment; a quick and sure solution might be achieved by inducing another depression—but that would be too severe a cure. Moreover, inflation has become a worldwide plague (TIME cover, April 8). The U.S., even if it can control the economic sickness within its own borders, might be subject to reinfection from abroad.

But if no quick, final cure is in sight, the Government still has an obligation to act. The economy, to be sure, is not completely manageable by Washington, but there are a number of policy actions that could be taken to greatly reduce inflation's severity. And in dealing with inflation, degree is crucial; the difference between price increases at annual rates of, say, 6% and 12% is the difference between excessive social drinking and incapacitating alcoholism.

The steps are slow-working and painful. Worse, they sound like a prescription for ensuring the defeat of any President who tries them, since they amount to taking on every vested interest in the economy at once. So there will be a strong temptation to avoid them and hope that a recent downturn in inflation—from an annual rate of 12.3% in the first quarter to 8.8% in the second—continues on its own. But that improvement is scarcely satisfactory; the Government must do all it can to bring the rate down further.

The first essential is to hold down federal spending and reduce the rate of increase in the U.S. money supply. That classic remedy for inflation has been advocated so often that Administration officials refer to it as "the old-time religion." It means slow growth, sluggish profits, increasing unemployment. So it is not surprising that the old-time religion has been more often preached than followed.

Right now, the Federal Reserve Board is acting the role of zealous convert. In 1972 and early 1973 it pumped out enough money to overstimulate a booming economy; money supply in the last quarter of 1972 grew at a startling annual rate of 8.4%. Lately the board has held the increase to a rate of about 6%, a growth much slower than the explosive—and inflationary—surge in demand for business loans. Interest rates have consequently gone into orbit. But as Alan Greenspan, who is Nixon's choice to become head of the Council of Economic Advisers, has pointed out, that policy has been pushed close to the point at which it will self-destruct. Savings and loan associations and savings banks cannot effectively compete with commercial banks for funds in the tight money market, and some may soon teeter on the edge of collapse. If so, the Federal Reserve would have to come to their rescue as "lender of last resort"—and that would mean another massive, inflationary increase in the money supply. The Federal Reserve, in other words, cannot fight inflation all by itself; it needs help from Administration budget makers—who, while preaching fiscal conservatism, have run up a cumulative deficit of $68 billion in five years.

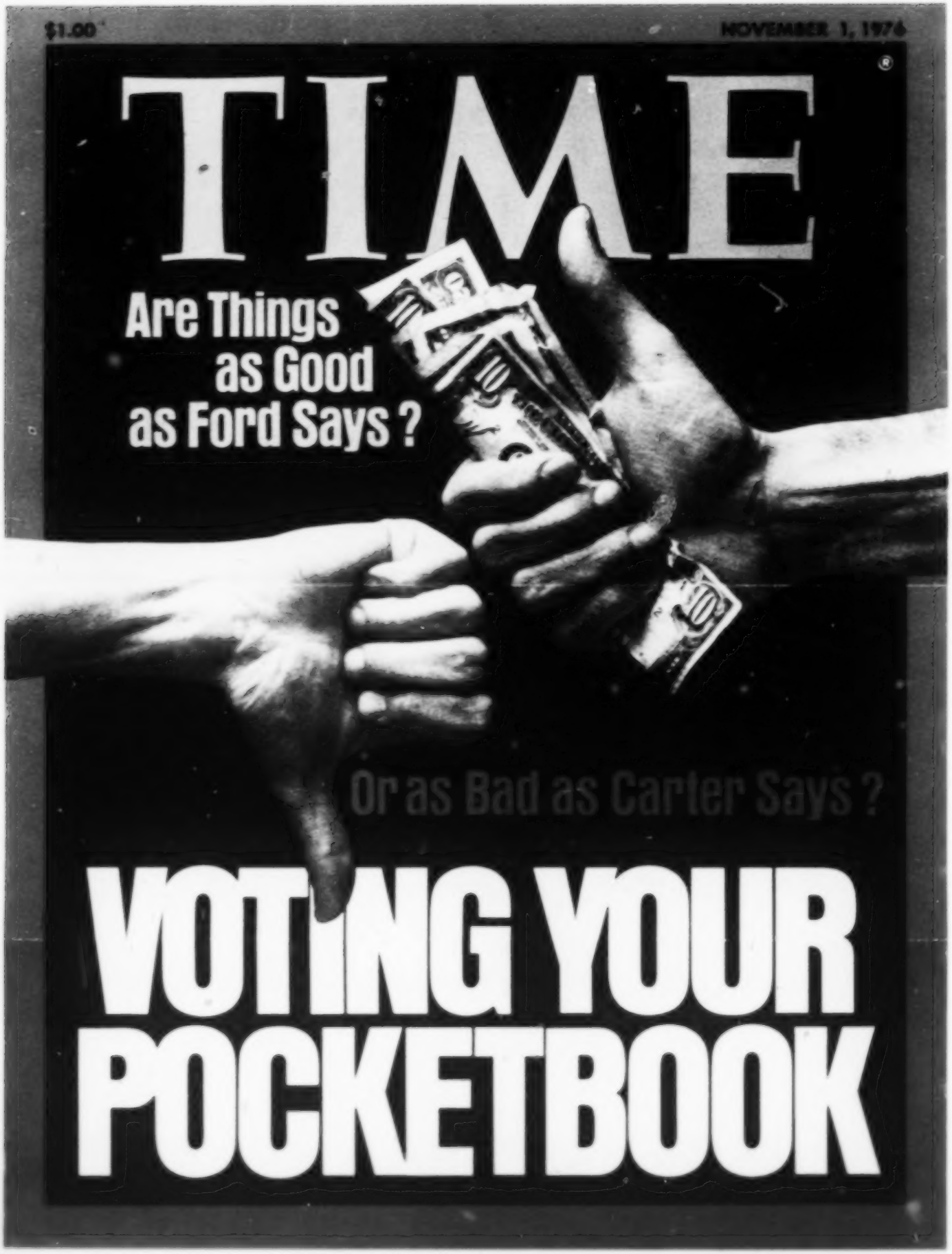
Federal Reserve Chairman Arthur Burns called last week for a $10 billion cut in Government spending for fiscal 1975, which is budgeted at $305 billion, *v.* $270 billion in the last fiscal year. President Nixon himself has said that expenditures should be held to $300 billion, at which point they might just be balanced by growing revenues, but he has postponed the hard decisions about where to cut. Small wonder. The choice will have to be made from a herd of sacred cows: military spending, veterans' benefits, revenue-sharing aid to states and cities.

The size and specifics of any cut in this year's budget are less important than that the Administration, the Federal Reserve and Congress all determine to apply fiscal-monetary restraint for as long as is necessary. The policy need not be pressed hard enough to cause a recession. Rather, the strategy should be to permit some real growth, but keep the budget and monetary brakes on hard enough to hold total demand for several years slightly below the economy's capacity to increase the output of goods and services, until the inflationary momentum at last subsides.

Such a hold-down would set up severe strains in the economy, which the Government must be prepared to ease. For one thing, credit would remain scarce and costly, especially for small businessmen and home buyers. To prevent big corporations from gobbling up all the loan money, the Government would have to nag bankers to turn down some loans and perhaps institute credit controls if they refused.

A long-term program of holding down demand would mean that for years the nation could not reduce the jobless rate to the 4% "full employment" level; unemployment might well rise beyond the present 5.2%. The unemployed, of course,

TIME
THE BIG PAYOFF
Lockheed Scandal:
Graft Around the Globe


$1.00
NOVEMBER 1, 1976
TIME
Are Things as Good as Ford Says?
Or as Bad as Carter Says?
VOTING YOUR POCKETBOOK

FORTUNE

$2.00 February 12, 1979

AMERICA'S INVISIBLE RICH

Taiwan's Future

The Nightmare of Natural-Gas Decontrol

Cadillac's Super-Salesman

Sports Illustrated
FEBRUARY 16, 1981 $1.50

ANATOMY OF A SCANDAL

The Mastermind's
Inside Story of the Boston College
Point-Shaving Scheme

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,

Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.,*

Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF FREDERICK A. O. SCHWARZ, JR.

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FREDERICK A. O. SCHWARZ, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Cravath, Swaine & Moore, attorneys for plaintiff herein. For a number of years, plaintiff Time Inc. ("Time") has consulted me and my firm concerning the controversy with the Secret Service and the Department of the Treasury involved in the instant action.

Summary

2. I submit this affidavit in support of plaintiff's motion for summary judgment

(a) to set forth the historical facts as to the complaints and warnings plaintiff has received from agents and employees of defendants, or of their predecessors, with respect to Time's use of photographs and artwork depicting illustrations of United States currency—partial, distorted and doctored illustrations not remotely susceptible of use for any purpose relating to counterfeiting, but important, in the judgment of plaintiff's editors, to the effective reporting of the news; and

(b) to indicate how Title 18, U.S.C. § 474 ¶ 6 and § 504 have been construed and applied by the Department of the Treasury and the Secret Service, in relation to photographs and artwork published or intended to be published by Time—*i.e.*, to prohibit speech which poses no risk to the realization of the government's interest in the prevention of counterfeiting; and to regulate such speech as the government allows based upon criteria which bear no relation to fulfillment of that interest, but arrogate to the government authority to determine the content of "newsworthy" material for the press.

The following five paragraphs briefly summarize the substance of Time's communications from the Secret Service, with cross-references to the material set forth in greater detail below, and describe the announcements, accusations and demands from the Service in May 1981 which immediately preceded the filing of this lawsuit.

3. Over the past several years, members of Time's legal and production departments have been advised by agents and employees of the Secret Service on numerous occasions that in the opinion of the Department of the Treasury, photographs and artwork appearing in Time's magazines violated the prohibitions of Title 18, U.S.C. respecting the printing or publication of likenesses of United States currency, and that Time must

cease and desist from further violations. (See ¶¶ 10-16, *infra.*) In addition, on several occasions when the legal or production departments of Time sought the views of the Secret Service as to the lawfulness of photographs or artwork intended to be used in future issues of Time's magazines, they were advised that the intended illustrations would violate the statutory prohibitions and could not be used. (See ¶¶ 8 and 9, *infra.*) Copies of the actual and proposed illustrations challenged by the Secret Service are annexed as Exhibits hereto. As is evident from the face of these pictures, none could possibly serve as instruments of counterfeiting.

4. In the course of the communications between Time and the Secret Service, different agents and employees of the Secret Service have expressed on behalf of the Department of the Treasury varying views as to the scope of the prohibition set forth in Title 18, U.S.C. § 474 ¶ 6 and the partial exemption provided in Title 18, U.S.C. § 504.

(a) On several occasions, Time has been instructed that no color likeness of any portion of a specimen of currency may be published, regardless of the size or medium of the illustration, but that black and white likenesses are permissible so long as they conform to the requirements as to size set forth in Title 18, U.S.C. § 504 and appear in a publication for one of the purposes approved by the statute. (See ¶¶ 8, 11, 12, 14 and 15, *infra.*)

(b) On at least one occasion, however, Time was instructed that in the opinion of the Department of the Treasury, no photograph of any portion of a specimen of currency may be published, regardless of its color or size, because a photograph is not an "illustration" within the meaning of § 504. (See ¶ 9, *infra.*)

(c) On other occasions, moreover, Time has been advised that in the opinion of the Department of the Treasury, no illustration of any portion of a specimen of currency may be published, regardless of its color or size or the medium of illustration, unless accompanied by "numismatic, educational,

historical or newsworthy" information specifically concerning the particular Federal Reserve Note illustrated. (See ¶¶ 13 and 17, *infra.*) This construction of § 504—which bars *all* symbolic depictions of currency for *any* purpose, including, *e.g.*, a black and white broad-brush likeness of a crumpled and shrunken $5 bill, intended graphically to express the toll of inflation—appears to be the current official interpretation of the Department of the Treasury, as set forth in a publication received by a member of Time's Legal Department from an agent of the Secret Service on May 21, 1981, six days before this action was filed. (See ¶ 17, *infra*, and Ex. 12.)

5. At no time has any agent or employee of the Department of the Treasury or the Secret Service ever intimated to Time that the scope of the prohibition upon publication of illustrations of currency might relate in any manner to the likelihood that a given illustration might actually be used in some fashion in a scheme for counterfeiting or forgery.

6. On May 19, 1981, Time reported to me that an agent of defendant D'Amelio had once again complained that a photograph appearing in one of plaintiff's publications—the cover of the February 16, 1981, issue of SPORTS ILLUSTRATED magazine—violated Federal penal laws. The photograph in question illustrated a story in that issue of the magazine about corruption in college basketball, and pictured portions of scores of $100 Federal Reserve Notes, photographically reduced in size, stuffed inside a basketball hoop and net.[1] Time was further advised by defendant D'Amelio's agent (i) that the Secret Service intended to seize all plates and other materials involved in the production of the SPORTS ILLUSTRATED cover; (ii) that the names and addresses of all persons involved in the

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[1] Copies of the photograph which provoked this announcement and the succeeding series of demands from the Service are annexed to the complaint herein as Exhibit F, and to this affidavit as Exhibit 11. The details of the communciations between plaintiff and the Secret Service relating to the SPORTS ILLUSTRATED cover are set forth at ¶¶ 16-17, *infra*, and the background of the decision to use that cover is discussed in the accompanying Affidavit of SPORTS ILLUSTRATED's Managing Editor, Gilbert Rogin, at ¶¶ 3-6.

preparation of the SPORTS ILLUSTRATED cover must be delivered to the Secret Service; and (iii) that the agent wished to "interview" a member of plaintiff's management in the presence of counsel.

7. In view of the increasing importance of the photographs and artwork for which the Secret Service routinely berates plaintiff, and the increasing jeopardy to plaintiff's editors and art directors from the ongoing pattern of harassment and complaints, I advised Time to commence this lawsuit, to clarify the fact that defendants cannot constitutionally interfere with the editorial judgments of plaintiff's editors as to the design or content of published material which creates no danger to the fulfillment of any legitimate governmental interest.

Illustrations Barred by the Secret Service

8. The cover of the September 10, 1965, issue of TIME magazine illustrated a story appearing at pp. 84-88 of that issue about a forthcoming conference on international monetary policy, and featured a painted portrait of Henry Fowler, then Secretary of the Treasury. The managing editor and art director of TIME intended to use for the background of Secretary Fowler's portrait a color painting of a furled $10 Federal Reserve Note on which the portrait of Alexander Hamilton, the legend, "United States of America", and the arabic number "10" would have been visible. When Time sought the views of the Secret Service as to the lawfulness of the intended background painting, it was advised by E. A. Wildy, then Assistant Chief of the Secret Service, that in the opinion of the Department of the Treasury, a painted color presentation of a portion of a specimen of currency such as that which TIME intended to use is prohibited by Title 18, U.S.C. § 474 if it so much as "resembles" a part of a genuine Federal Reserve Note. A copy of the cover actually used for that issue of TIME—which includes, in the background of Secretary Fowler's portrait, a black-and-white artist's rendering of a $10 Note that apparently satisfies Federal law, but in fact bears a closer

likeness to a genuine Note than the illustration that was banned—is annexed hereto as Exhibit 1.

9. The July 1977, issue of FORTUNE contained at pp. 144-154 an article dealing with the financial circumstances of the K-Mart Corporation, a "cash-rich" enterprise confronted by the need to make wise investment decisions in order to maintain its record of earnings. To illustrate that article, which was entitled "K Mart Has To Open Some New Doors on the Future", the managing editor and art director of FORTUNE intended to use a color photograph depicting portions of three $100 Federal Reserve Notes as a "landscape" of financial resources set beneath a series of open doorways in the sky. Each of the Notes in the intended illustration was significantly enlarged, shown only in part, and distorted photographically in color, shape and size. When the legal department of Time sought the views of the Secret Service as to the lawfulness of the intended illustration, it was advised by Robert H. Rasor, then Assistant Legal Counsel to the Director of the Secret Service, that in the opinion of the Department of the Treasury, use of the illustration was prohibited by Title 18 on two separate grounds, in that (i) it included a color reproduction of portions of specimens of currency, and (ii) it was a photograph, and Title 18, U.S.C. § 504 creates an exception for "illustrations" only. A copy of the photograph intended to be used in the July 1977 issue of FORTUNE is annexed hereto as Exhibit 2. A copy of the photograph used instead is annexed hereto as Exhibit 3. In the editorial judgment of FORTUNE's Art Director, the photograph actually printed was not nearly as effective in communicating the thought intended to be conveyed as the illustration banned by the Secret Service. (See Affidavit of Ronald N. Campbell ("Campbell Aff."), ¶ 6.)

Complaints and Warnings from the Secret Service

10. Between December 1970 and May 1981, plaintiff's magazines utilized photographs and artwork depicting illustrations of currency to report information and commentary on

matters ranging from an election of the President of the United States to corruption in amateur sports. On at least six occasions during that period, plaintiff was informed by agents of the Secret Service that in the opinion of the Department of the Treasury, these photographs and artwork failed to satisfy the requirements of Title 18, U.S.C. § 504, and therefore violated Title 18, U.S.C. § 474. In each of the illustrations about which the Service complained, the Federal Reserve Notes pictured were shown only in part, dramatically enlarged or reduced in size, distorted in appearance, and/or substantially obscured by printed legends or overlaid graphic designs. By definition, each appeared on only one side of a page, and that page was of the glossy paper used in the production of plaintiff's magazines.

11. The cover of the December 14, 1970, issue of TIME illustrated a story on inflation appearing at pp. 82-90 of that issue captioned "The Battle of the Buck", and featured a dramatically enlarged photographic rendering of approximately one-quarter of the face of a $1 Federal Reserve Note, tinted in green, showing the portrait of George Washington shedding a dark green tear. (A copy of that cover is annexed to the Complaint as Exhibit A, and to this affidavit as Exhibit 4. Its editorial and artistic value to TIME is discussed in the accompanying affidavits of TIME's Managing Editor and Art Director; see Affidavit of Ray C. Cave ("Cave Aff.") at ¶¶ 6, 10-11, and Affidavit of Rudolph Hoglund ("Hoglund Aff.") at ¶¶ 7-8.) Approximately one month after that issue of TIME was published, William Lometti, an agent of the Secret Service, telephoned Dennis Wheeler of Time's production department to advise him that in the opinion of the Department of the Treasury, the photograph used on the December 14, 1970, cover of TIME violated Federal law. When Harry M. Johnston of Time's legal department called Mr. Lometti the following day to inquire why the cover was unlawful, Mr. Lometti replied that Federal law bars publication in color of any likeness of the currency, and warned that Time must cease and desist from further violations. Mr. Lometti volunteered, however, to furnish "advisory opinions" on behalf of the Secret Service as to

the permissibility of photographs and artwork which Time might wish to publish in its magazines in the future.

12. The July 29, 1974, issue of TIME contained at p. 43-44 an essay captioned "How to Mobilize Against Inflation", and was illustrated at p. 43 by a photographic reproduction in black and white of approximately one-half of the face of a $1 Federal Reserve Note, substantially obscured by an overlaid picture of a life preserver. (A copy of the essay in which that photograph appeared is annexed to the Complaint as Exhibit B, and to this affidavit as Exhibit 5.) Approximately two months after that issue of TIME was published, E. Gabriel Perle of Time's legal department was visited in his office by Gerard R. Connolly, an agent of the Secret Service, who advised him that in the opinion of the Department of the Treasury, the photograph on p. 43 of the July 29, 1974, issue of TIME violated the provision of Title 18, U.S.C. § 504 barring the publication in black and white of any illustration of any part of a specimen of United States currency that is not less than three-quarters nor more than one and one-half times actual size, and warned that Time must cease and desist from further violations. Pursuant to Mr. Connolly's instructions, Time's legal department promptly undertook to ensure that all plates and other materials used in the production of the photograph were destroyed, and advised Mr. Connolly that this had been accomplished by letter dated October 29, 1974.[2]

13. The cover of the February 23, 1976, issue of TIME illustrated a story appearing at pp. 28-36 in that issue about alleged international bribery by an American aircraft firm, and contained a photographic reproduction in black and white of a $1,000 Federal Reserve Note clutched in a "cartoon" hand, and substantially obscured by both the cartoon thumb and the printed legend, "The Big Payoff". (A copy of that cover is

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[2] As noted in the accompanying affidavit of Henry A. Grunwald, the Editor-in-Chief of Time Inc., plaintiff has no objection to that part of § 504 which requires that plates and negatives of photographs and artwork depicting currency be destroyed after their final use. (*See* Affidavit of Henry A. Grunwald ¶ 13.)

annexed to the Complaint as Exhibit C, and to this affidavit as Exhibit 6; it is further discussed in Cave Aff. ¶ 7 and Hoglund Aff. ¶ 7.) By letter dated February 24, 1976, a copy of which is annexed hereto as Exhibit 7, Time was advised by H. Terrence Samway, Assistant Legal Counsel to the Director of the Secret Service, that in the opinion of the Department of the Treasury, the February 23, 1976, cover of TIME violated the provision of Title 18, U.S.C. § 504 prohibiting the publication in black and white of any illustration of a specimen of United States currency that is not less than three-quarters nor more than one and one-half actual size. Mr. Samway further advised Time that in the opinion of the Department of the Treasury, publication of a black and white illustration of a specimen of United States currency of the permitted size is lawful only if, in addition, the illustration appears for "historical, educational, numismatic or newsworthy purposes", and is "accompanied by information about the particular item reproduced and [is not] used for decorative or eye-catching purposes." On February 25, 1976, agents of the Secret Service appeared at the office of Walter S. Censor of Time's legal department, and warned that Time must cease and desist from further violations of the penal laws prohibiting illustration of the currency.

14. The cover of the November 1, 1976, issue of TIME illustrated a story appearing at pp. 18-22 of that issue captioned "Voting Your Pocketbook", and contained photographic reproductions in color of folded $1, $10 and $20 Federal Reserve Notes reduced to less than one-half actual size, clutched in a human hand. (A copy of that cover is annexed to the Complaint as Exhibit D and to this affidavit as Exhibit 8; its editorial and artistic purposes are described in Cave Aff. ¶ 8 and Hoglund Aff. ¶¶ 7-8.) By letter dated November 18, 1976, a copy of which is annexed hereto as Exhibit 9, Mr. Censor was advised by Mr. Rasor that in the opinion of the Department of the Treasury, the photograph used on the November 1, 1976, cover of TIME violated the provision of Title 18 prohibiting publication in color of any likeness of the currency. Mr. Rasor further reported that the Treasury Department's "files indicate that Time Incorporated has repeatedly failed to comply with

the criteria [governing printing or publication of likenesses of the currency] outlined in [Title 18, U.S.C.,] section 504 . . . .", warned that Time must cease and desist from further violations, and advised that if Time failed to comply with this instruction, the Secret Service would "refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action."

15. The cover of the February 12, 1979, issue of FORTUNE illustrated an article captioned "America's Invisible Rich" appearing at pp. 92-104 of that issue of the magazine, and contained a photographic reproduction in color of portions of Federal Reserve Notes, enlarged to more than twice actual size, folded twice, and enclosed within an overlaid money clip. Approximately one-third of the reverse side of a $1,000 Note and fragments of the borders of the remaining Notes were visible. (A copy of that cover is attached to the Complaint as Exhibit E, and to this affidavit as Exhibit 10; its purpose is discussed in Campbell Aff. ¶ 5.) Approximately nine months after that issue of FORTUNE was published, an agent of the Secret Service advised Harry M. Johnston of Time's legal department by telephone that in the opinion of the Department of the Treasury, the photograph used on the February 12, 1979, cover of FORTUNE violated the provision of Title 18 barring publication in color of any likeness of the currency, and that he had been instructed by his superiors in Washington, D.C. to give Time a " 'slap on the wrist' ".

16. Finally, the cover of the February 16, 1981, issue of SPORTS ILLUSTRATED illustrated a story appearing at pp. 14-21 of that issue about a scandal in amateur basketball, and contained photographic reproductions in color of portions of several dozen $100 Federal Reserve Notes, reduced to approximately one-third actual size, stuffed inside or descending into a basketball hoop and net. (A copy of that cover is annexed to the Complaint as Exhibit F, and to this affidavit as Exhibit 11.) On May 18, 1981, William Clancy, an agent of the Secret Service, informed Mary F. Gibbons of Time's legal department that in the opinion of the Department of the Treasury, the

photograph used on the February 16, 1981, cover of SPORTS ILLUSTRATED violated Title 18, U.S.C. ¶ 474, and that it would be necessary for the Secret Service to seize all plates and other materials used in connection with the production of that cover. Mr. Clancy requested that he be given the names and addresses of the printers who prepared the cover and of any other individuals or companies involved in its layout or physical development, and further requested an "interview" with a member of Time's management, with counsel present if so desired. In the course of the conversation, Mr. Clancy stated that the statutory prohibition on publication of currency illustrations is intended as a broad deterrent, to forestall the possibility that someone involved in the process of printing illustrations might conclude it was easy to copy currency, and thus be inspired to do so for profit.

17. On May 21, 1981, Ms. Gibbons received from Mr. Clancy in the mail a publication of the Department of the Treasury, a copy of which is annexed hereto as Exhibit 12, which purports to set forth pertinent information as to the conditions under which it is permissible to print illustrations of United States and foreign obligations and securities. *Inter alia,* that publication states:

> "To be permissible, an illustration must be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Illustrations used primarily for decorative or eye-catching purposes are not permissible." (Exhibit 12, page 2 of text.)

Conclusion

18. The events and communications described in the foregoing paragraphs and the exhibits annexed hereto reveal that

(a) the Department of the Treasury and the Secret Service have failed to arrive at a consistent view of either

the purpose or the scope of the proscriptions in Title 18, U.S.C. respecting publication of likenesses of currency;

(b) the Department of the Treasury and the Secret Service construe Title 18, U.S.C. § 504 substantially to extend the sweep of its prohibitions, and to confer upon those agencies discretion to determine the identity and nature of the "educational, historical or newsworthy purposes" for which some black and white illustrations of currency are permitted; and

(c) Title 18, U.S.C. § 474 ¶ 6 and § 504 are construed by the Department of the Treasury and the Secret Service absolutely to prohibit publication of illustrations of currency which pose no danger to the realization of the Government's interest in prevention of counterfeiting and forgery, and are applied by those agencies entirely without regard to the likelihood that a particular illustration might actually be used for counterfeiting purposes.

/s/ FREDERICK A. O. SCHWARZ, JR.

Frederick A. O. Schwarz, Jr.

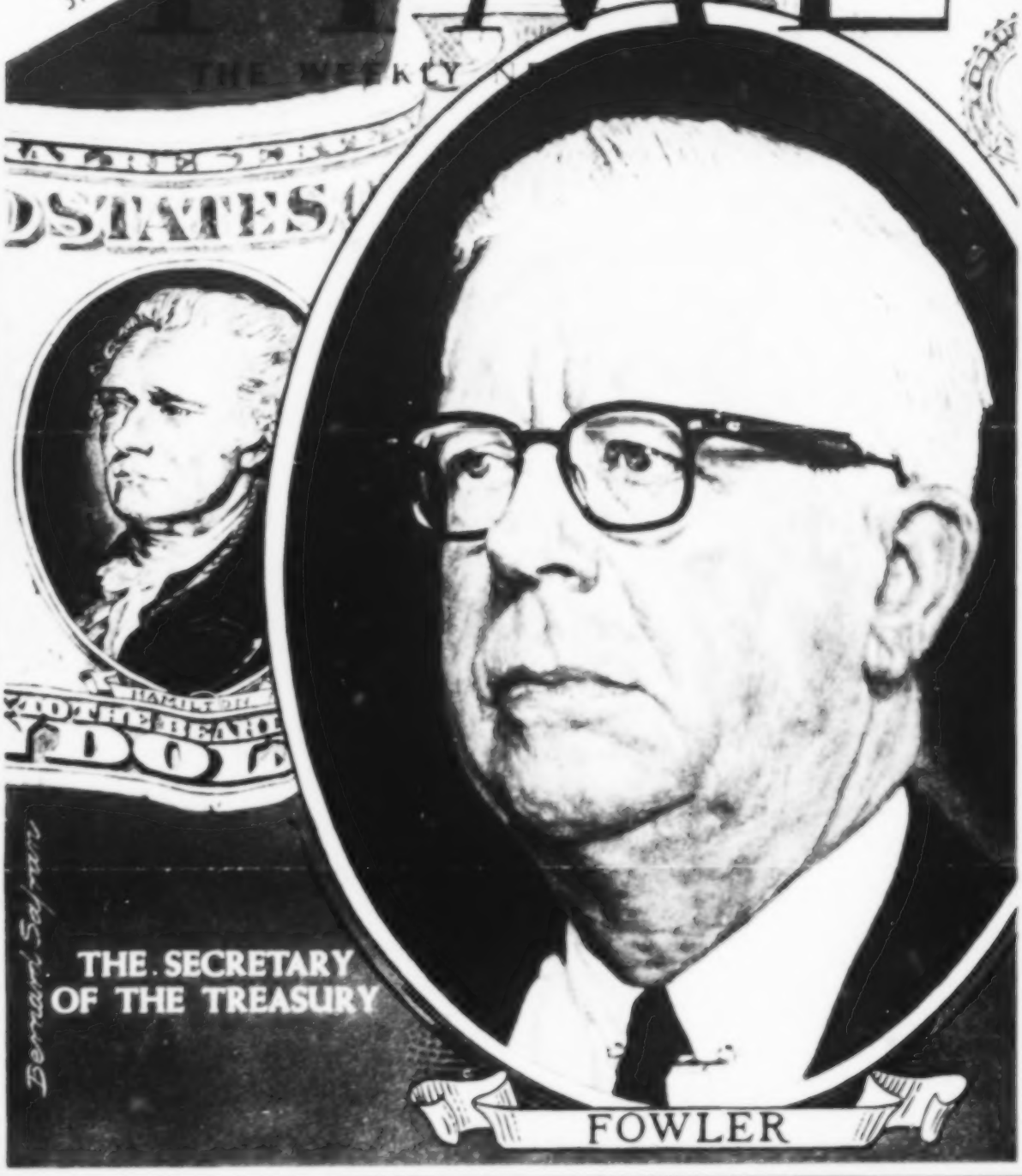
[Subscribed and Sworn to
July 20, 1981.
(Jurat omitted in printing)]

THIRTY-FIVE CENTS SEPTEMBER 10, 1962

THE WORLD'S NEED FOR MONEY
Should the Dollar Be Almighty?

TIME

THE WEEKLY



VOL. 80 NO. 11

Exhibit 4 to Schwarz Affidavit

Cover Illustration, TIME Magazine,
December 14, 1970

(same as Exhibit A to Complaint, page 13, *supra*)

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Exhibit 5 to Schwarz Affidavit

Page 43, TIME Magazine,
July 29, 1974

(same as Exhibit B to Complaint, page 15, *supra*)

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Exhibit 6 to Schwarz Affidavit

Cover Illustration, TIME Magazine,
February 23, 1976

(same as Exhibit C to Complaint, page 17, *supra*)

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Exhibit 7 to Schwarz Affidavit

DEPARTMENT OF THE TREASURY

UNITED STATES SECRET SERVICE

WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

February 24, 1976

EARLY REPLY

[Stamped legend of recipient]

Time Magazine
Rockefeller Center
New York, New York 10020

Dear Sirs:

Reference is made to your February 23, 1976 issue of Time Magazine in which you use a $1,000 Federal Reserve Note on the cover and in an article about "The Big Payoff".

In that connection, sections 8, 474 and 475 of title 18, United States Code, generally prohibit the reproduction of currency.

Section 504 of title 18, United States Code, makes an exception to the foregoing prohibitions and permits illustrations of paper money provided the reproductions are in black and white; are of a size less than three-fourths or more than one and one-half times the size of genuine obligations and appear in articles, books, journals, newspapers, or albums for historical, educational, numismatic or newsworthy purposes. The Department has taken the position that in order for an illustration to be permissible it must be accompanied by information about the particualr item reproduced and cannot be used for decorative or eye-catching purposes.

It is the opinion of this Office, in which the Office of General Counsel concurs, that your reproduction of the $1,000

Federal Reserve Note on the cover of Time Magazine of February 23, 1976 is prohibited since it does not comply with *all* four criteria of 504, *supra*, specifically the size requirement.

Sincerely yours,

David H. Martin
Legal Counsel

By: /s/ H. TERRENCE SAMWAY
H. Terrence Samway
Assistant Legal Counsel

Received
March 4, 1976
Harry M. Johnston, III

[Stamped legend of recipient]
[underscoring by recipient]

Exhibit 8 to Schwarz Affidavit

Cover Illustration, TIME Magazine,
November 1, 1976

(same as Exhibit D to Complaint, page 19, *supra*)

Exhibit 9 to Schwarz Affidavit

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

November 18, 1976

Mr. Walter S. Censor
Associate Counsel
Time Incorporated
1271 Avenue of the Americas
New York, New York 10020

Dear Mr. Censor:

Reference is made to the November 1, 1976 issue of TIME magazine. Further reference is made to the cover of this magazine where there appear reproductions of Federal Reserve Notes ($1, $10, and $20).

The subject reproductions of Federal Reserve Notes appearing on the cover of TIME magazine are in violation of section 474 of title 18, United States Code, which prohibits making any photograph, print or impression in the likeness of obligations and securities of the United States, or any part thereof.

While section 504 of title 18, United States Code, makes an exception to the foregoing prohibition and permits illustrations of obligations and securities of the United States provided certain size and color restrictions are met and they appear in articles, books, journals, newspapers or albums for historical, educational, numismatic or newsworthy purposes, it does not permit illustrations of obligations and securities in color or for advertising purposes.

Our files indicate that Time Incorporated has repeatedly failed to comply with the criteria outlined in section 504, *supra*. This matter was first brought to our attention after publication

of the November 5, 1973 issue of TIME magazine which contained an advertisement by Electronics International. On January 25, 1974, Secret Service Agents interviewed Mr. John Heath, Divisional Sales Manager, advising him of the violation. Mr. Heath stated that Time would cease and desist this type of advertising.

The July 1974 issue of TIME contained a partial reproduction of a $1 Federal Reserve Note, which was also in violation of section 474, *supra*. On September 20, 1974, agents of this Service interviewed Mr. Pearle, Attorney for Time, Incorporated, advising him of the violation. Mr. Pearle agreed to cease and desist reproductions of this type in the future.

On the cover of the February 23, 1976, issue of TIME there appeared a $1,000 Federal Reserve Note reproduction. On February 25, 1976, agents of this Service interviewed you and they were assured there would be no repetition of this violation.

We are again advising Time, Incorporated to cease and desist from the use of any future reproductions of currency appearing in color or for advertising purposes. If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action.

Sincerely yours,

David H. Martin
Legal Counsel

By: /s/ ROBERT H. RASOR

ROBERT H. RASOR
Assistant Legal Counsel

Exhibit 10 to Schwarz Affidavit

Cover Illustration, FORTUNE Magazine,
February 12, 1979

(same as Exhibit E to Complaint, page 21, *supra*)

Exhibit 11 to Schwarz Affidavit

Cover Illustration, SPORTS ILLUSTRATED Magazine,
February 16, 1981

(same as Exhibit F to Complaint, page 23, *supra*)

Use Of Illustrations Of Obligations & Securities Of The United States & Foreign Governments

Department Of The Treasury

United States Secret Service

The Department of the Treasury sponsored legislation to liberalize and clarify laws relating to the use of illustrations and films of paper money, postage and revenue stamps, checks, bonds and other obligations of the United States and foreign governments. This legislation was passed by Congress on September 2, 1958 (Public Law 85-921) and was further amended on June 20, 1968, to permit reproductions of postage stamps in color under certain conditions (Public Law 90-353).

As the Federal enforcement agency charged with safeguarding our Nation's currency, the United States Secret Service believes that any permission to photograph and reproduce pictures of money, in color, would seriously weaken the safeguards designed to protect our currency.

As an aid to those interested in the use of such illustrations and films, this leaflet sets forth pertinent information as to the conditions under which it is permissible to print illustrations and to make films of United States and foreign obligations and securities.

PAPER MONEY, CHECKS, BONDS, ETC.

Printed illustrations of paper money, checks, bonds and other obligations and securities of the United States and foreign governments are permissible for numismatic, educational, historical and newsworthy purposes, and for numismatic or philatelic advertising but not for general advertising purposes. Illustrations must be in black and white and must be less than three-fourths or more than one and one-half times the size of the genuine instrument. No individual facsimiles of such obligations are permitted, and no illustrations of paper money, checks or bonds may be in color.

To be permissible, an illustration must be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Illustrations used primarily for decorative or eye-catching purposes are not permissible.

Motion-picture films, microfilms and slides of paper money, checks, bonds and other obligations and securities of the United States and foreign governments are permitted in black and white or in color for projection upon a screen or for use in telecasting. They may not be used for advertising purposes, except philatelic or numismatic advertising.

ADVERTISING

Printed illustrations or films of paper money, checks or bonds are not permitted in connection with advertising. However, printed illustrations of paper money, but not films, may be used in connection with numismatic advertising. Also, Treasury regulations permit the illustration of United States bonds in connection with a campaign for the sale of such bonds.

UNITED STATES AND FOREIGN POSTAGE STAMPS

Printed illustrations of canceled and uncanceled United States postage stamps are permissible for articles, books, journals, newspapers or albums for philatelic, educational, historical and newsworthy purposes.

"less than 3/4 or more
than 1 1/2 times"
ONE DOLLAR

Black and white illustrations may be of any size. Colored illustrations of canceled United States postage stamps may be of any size. However, illustrations in color of uncanceled United States postage stamps must be less than three-fourths or more than one and one-half times the size of the genuine stamp.

Printed illustrations of canceled foreign stamps in black and white or color, are permissible in any size and for any purpose.

Black and white and color illustrations of uncanceled foreign postage stamps are permitted for philatelic, educational, historical and newsworthy purposes. Black and white illustrations may be of any size, but color illustrations must be less than three-fourths or more than one and one-half times the size of the genuine stamp.

Motion-picture films and slides of United States and foreign postage stamps are permissible in black and white or in color for projection upon a screen or for use in telecasting. They are not permissible for advertising purposes except for philatelic advertising.

PHILATELIC ADVERTISING

Black and white illustrations of canceled and uncanceled United States and foreign postage stamps, as well as colored illustrations of canceled postage stamps are permissible in any size, for philatelic advertising. Uncanceled colored illustrations of United States and foreign postage stamps are permitted for philatelic advertising, but must meet the three-fourths or one and one-half size restrictions.

Note: Canceled U. S. and foreign postage stamps must bear an official cancellation mark, i.e., the stamps must have been used for postage.

REVENUE STAMPS

Regulations for printed illustrations of United States and foreign revenue stamps are the same as for postage stamps, except that colored illustrations of United States revenue stamps are not permitted.

DESTRUCTION OF PLATES AND NEGATIVES

The plates and negatives, including glossy prints, of any United States or foreign obligations produced for any of the above purposes, must be destroyed after their final use for the purpose for which they were made.

COINS

Photographs or printed illustrations, motion-picture film or slides of United States and foreign coins may be used for any purpose including advertising.

With few exceptions, existing law generally prohibits the manufacture, sale or use of any token, disk or device in the likeness or similitude of any coins of the United States or of any foreign country which are issued as money.

"canceled stamps may
be in color &
in any size"
8¢
ENHOWER USA

EXCERPTS FROM APPLICABLE STATUTES

TITLE 18, U.S. CODE, SECTION 8

"The term 'obligation or other security of the United States' includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps."

TITLE 18, U.S. CODE, SECTION 481

"Whoever, except by lawful authority, prints, protographs, or makes, executes, or sells any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or whoever brings into the United States any counterfeit plate, stone, or other thing, engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation shall be fined not more than $5,000 or imprisoned not more than five years, or both."

TITLE 18, U.S. CODE, SECTION 15

"The term 'obligation or other security of any foreign government' includes, but is not limited to, uncanceled stamps, whether or not demonetized."

TITLE 18, U.S. CODE, SECTION 504

"Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negative and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term 'postage stamp' includes postage meter stamps."

TITLE 18, U.S. CODE, SECTION 474

"Whoever prints, photographs, or in any other manner makes

or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security (of the United States), or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; • • • shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

TITLE 18, U.S. CODE, SECTION 475

"Whoever designs, engraves, prints, makes, or executes, or utters, issues, distributes, circulates, or uses any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any obligation or security of the United States issued under or authorized by any Act of Congress or writes, prints, or otherwise impresses upon or attaches to any such instrument, obligation, or security, or any coin of the United States, any business or professional card, notice, or advertisement, or any notice or advertisement whatever, shall be fined not more than $500."

TITLE 18, U.S. CODE, SECTION 489

"Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money, either under the authority of the United States or under the authority of any foreign government shall be fined not more than $100."

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF HENRY A. GRUNWALD

(filed July 21, 1981)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HENRY A. GRUNWALD, being duly sworn, deposes and says:

1. I am the Editor-in-Chief of Time Inc., and am ultimately responsible for the editorial content and approach of all of Time Inc.'s publications, including TIME, FORTUNE, SPORTS ILLUSTRATED, LIFE, PEOPLE, MONEY and DISCOVER. I submit this affidavit on behalf of Time Inc.; its editors, journalists and artists; and, in my opinion, in the interest of the readers of the magazines published by Time. Because they significantly restrict Time Inc.'s ability to attract,

engage and communicate with our readers about important contemporary issues—such as inflation, the economy and corruption, to name but a few—for absolutely no sensible purpose, I believe the criminal statutes challenged in this lawsuit impose an unaccountable and wholly unjustifiable burden upon free expression.

Summary

2. After briefly setting forth my background as a journalist and editor, I shall explain why symbolic representations of money are important to Time Inc., and why the Federal statutes prohibiting their use constrain our ability to report news and express editorial ideas to the public. Particularly in today's world, where communication must be immediate and compact to be powerful, visual symbols are indispensable aids to Time's editors and artists. The statutes involved here tell journalists that they may be held criminally liable if they choose to use, as a vehicle for communication, a symbol of inestimable value in reporting on issues which rank among the preeminent news stories of our time. The prohibitions they impose serve no useful purpose, for the idea that the distorted depictions—or any depictions—of currency published by Time Inc. could be of any value in counterfeiting is ridiculous.

3. I will also explain in this affidavit why a statutory exemption allowing certain highly restricted uses of some black and white illustrations of currency—if they are thought "newsworthy" by the Government—places a heavy burden on our form of journalism. Color artwork and photographs enable magazines to capture certain kinds of events and ideas with special drama and impact, and Time Inc. has greatly expanded its use of color during the past decade. A law that denies us the right to publish color illustrations severely inhibits our expression, particularly when our broadcast competitors must endure no similar constraint.

4. Before explaining why I believe these prohibitions are irrational and unwarranted, I wish to recount briefly my background as a journalist.

Personal Background

5. I was born in Vienna, Austria, and came to the United States in 1940 at the age of 17. Both my career in journalism and my association with Time Inc. began when I was in college at New York University, when I worked part time at night as a copy boy for TIME magazine, and also served as editor-in-chief of the college paper. After a stint as a reporter for a labor newspaper, I was hired by TIME magazine as a writer on a trial basis in July 1945. Four months later I was appointed to the foreign news department, and six years after that, I became a Senior Editor of the magazine. I was appointed the Assistant Managing Editor of TIME in 1966, and the Managing Editor in 1968.

6. In the past 30 years, I have contributed scores of essays and cover stories to TIME, edited material for most departments of the magazine, and witnessed as well as initiated many changes in its format and editorial policy, including greatly expanded use of color photography. Though I became Corporate Editor of Time Inc. in 1977, and have been Editor-in-Chief of all Time Inc. publications since June 1979, I still occasionally write essays for TIME on a range of issues, including a recent essay on the First Amendment and the introduction to "American Renewal", a series of articles that appeared in all Time Inc. magazines.

7. At present, I am a member of the Boards of Directors of Time Inc., Time-Life Books Inc. and the Washington Star, as well as a director of the World Press Freedom Committee and a member of the Council on Foreign Relations, on whose behalf I recently chaired a commission on U.S. policy toward the Soviet Union. In addition to many articles for various magazines, I have written or contributed to several books, including biographies of Churchill and Salinger. In May 1979, I spoke at the Judicial Conference of the Second Circuit on the subject of freedom of the press.

The Importance of Currency as an Expressive Symbol

8. The law challenged here is, in my view, a perplexing and troubling historical aberration. Over my years as a journalist I have never encountered a statute that criminalizes the journalistic use of a common, nonpolitical cultural symbol. It may be useful to view the subject matter of this lawsuit from a historical and philosophical perspective. Throughout history, people have communicated with each other through symbols. Some symbols have deep personal meaning and serve to strengthen human bonds—for example, the Christian cross, the Jewish star of David, and the flag of one's country all serve to unify like-minded men and women in a common purpose. Other symbols, such as the Nazi swastika or the white hood of the Klansman, evoke powerful emotional reactions because they remind us of man's ability to find common purpose in racial or religious hatred. Indeed, some symbols, such as the hammer and sickle, have been thought so inherently powerful, and the ideas they represent so dangerous, that some governments have attempted to ban the use of the symbols themselves.

9. Of course, the symbol involved in this lawsuit—an illustration of a portion of paper currency—does not threaten governments, nor does it move people in love or hatred as do some other symbols. But this pedestrian symbol shares with the more spectacular symbols a common characteristic: all have the ability to capture and convey the essence of a thought in nonverbal form. Everyday experience teaches that the modern world—a world of corporate images, sleek logos, and public relations experts—fully understands the enormous power of communicative symbols. Both print and broadcast journalists rely heavily upon them to attract the attention of the public and to convey relatively brief analysis of complex ideas. An illustration of a big apple is now synonymous with New York City; a subway token reproduced in a newspaper connotes the story of the transit fare increase; five interlocking rings arranged a certain way convey the image of the Olympics; the dove has been transformed into a symbol for peace. In a time when we increasingly enhance our understanding of the events of our

world by communicating through such everyday images as an apple or a subway token, it strikes me as particularly odd that one of the most common and best understood symbols, money, is deleted from the journalist's lexicon.

10. The symbol of currency is of special value to journalists for several reasons. It is valuable, first, because the ideas it represents frequently involve such abstract issues as inflation, trade balances, and multi-billion dollar budgets—intangible phenomena for which graphic communicative devices are particularly useful to symbolize the news story behind the issue. For example, unlike many other news stories we cover, the inflation story is not comprised of noteworthy events or dramatic moments: we cannot take pictures of people experiencing the pain of the high cost of living in the same way we may be able to photograph an assassination attempt. As the accompanying affidavits of Time Inc. managing editors and art directors document in detail, the best graphic device for such stories is often money itself. For many purposes, no other symbol comes close in impact, versatility or precision.

11. Secondly, representations of money are important to journalists because the ideas they may be used to depict comprise a principal—if not *the* principal—continuing news story of this decade. In many decades in journalism, I have witnessed a succession of issues dominate the news—world war, cold war, civil rights, Viet Nam and Watergate spring immediately to mind, among many others. Today's issue of similar magnitude is the economy, with all its related subparts: tax cuts, unemployment, interest rates, Government spending, foreign industrial competition, and so forth, are all front page news. Time Inc.'s magazines cover them extensively because our readers demand that we keep them informed. By restricting our ability to employ illustrations of currency, these Federal statutes substantially deny us the use of a symbol uniquely suited to reporting on these critical issues, at a time when their importance to the public is increasing.

The Pointlessness of the Statutory Prohibitions

12. I am informed that the criminal laws restraining our use of illustrations of money were originally enacted at the time of the Civil War as part of a general statute relating to counterfeiting. Whatever a mid-nineteenth century magazine editor might have thought of them at the time, an editor of magazines published in the last quarter of the twentieth century can only find them nonsensical. The idea that a picture of paper money printed on one side of a page of glossy magazine stock is likely to be confused for a genuine United States note is, of course, absurd. And now that the technology of photoduplication is so generally and cheaply available to all, the idea that a would-be counterfeiter would use one of our illustrations —instead of taking his or her own dollar to a copying machine —is flatly ridiculous. This is all the more true because, as the exhibits to the Complaint and the Schwarz Affidavit reveal, the photographs and artwork we publish generally involve distorted, twisted and obscured representations of currency in the wrong size, the wrong colors, and often even the wrong shape. The thought that any of these might aid a counterfeiter is preposterous.

13. By the same token, those familiar with the magazine printing process know very well that the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency can be of little value to someone attempting to counterfeit a hand-engraved, two-sided dollar bill. However, if the Government perceives some remote possibility that the color offset plates used to produce our magazine covers might somehow be abused, Time Inc. does not object to that part of the statute which requires that materials used to print representations of money be destroyed after their final use. I understand that as a general matter, plates used in the production of covers for Time Inc.'s magazines are the property of the respective firms with which we have our printing contracts, and are routinely disposed of by the printers for their scrap metal value within a short time (say, 48 hours) after the print run is completed. The film from which the plates

are made generally remains Time Inc.'s own property. We would be happy to comply with any reasonable requests from the Government for prompt destruction of the materials which are ours to destroy, and to seek suitable assurances from our printers respecting prompt and secure disposal of the materials which remain with them.

The Statutory System Imposes Unwarranted Restrictions Upon Journalistic Expression

14. Even though there is no plausible connection between the artistic renderings of currency published by Time Inc. and the possibility of counterfeiting, these statutes impose severe restrictions on expression which the statutory exemption does not meaningfully mitigate. At a time when our magazines increasingly rely on photographs and artwork to accompany their texts, the law substantially prohibits not only the use of illustrations of currency itself, but also the depiction of *any part* of paper money, even though our use of such fragmentary pictures—distorted, enlarged, reduced, and juxtaposed with other common cultural symbols shared and understood by our readers—obviously offers no aid to a counterfeiter. Moreover, at a time when our magazines are increasing their use of color, the statutes totally forbid *any* rendering of currency in color. In a world where all visual communication media—including the television and movie industries, whose expression is not restrained by this law—rely extensively on color, laws which restrict our ability to use color pictures severely constrain our ability to express ourselves, and place us at a competitive disadvantage. Once again, this is all for no practical or valid purpose, for the usually exaggerated and distorted colors we have generally employed in our illustrations of money plainly preclude their use by even the most amateur criminal.

15. Journalists rightly abhor any statute which purports to guide or regulate their expression. The statutes here specify that illustrations of currency may be lawful if they are of a particular size, but not otherwise. They tell us an illustration may be legal if it is in black and white—ironically, the

predominant colors of the front of any piece of United States currency—but not if it is in color. Furthermore, they indicate that illustrations of currency must fulfill undefined "newsworthy", "historical" or "educational" purposes if they are to be used at all. To implement all this, the Government has adopted a system of "advisory opinions" which call upon us to tender our illustrations to the Secret Service for approval in advance. Collectively, the requirements of this statutory exemption impose a form of governmental regulation of the press unlike anything I have experienced in my journalistic career.

16. We at Time Inc. have been visited by government agents who have told our artists and editors what they may and may not publish. Government agents have demanded the names and addresses of all the people involved in printing a recent cover of SPORTS ILLUSTRATED. They have threatened us with criminal prosecution and suggested we obtain prior clearance on any illustration of currency we wish to use. This government conduct, in my opinion, undermines the independence and integrity of the press. This is why we have asked the Court to declare these laws unconstitutional.

Conclusion

17. Each of Time Inc.'s publications performs traditional journalistic functions in its own special style, reporting news to the public, analyzing complex problems, criticizing and evaluating governmental policies and social institutions. Unlike book publishers, we rely on concise articles and graphic representations to convey complicated ideas to our readerships. Unlike newspapers, we make abundant use of color in most of our magazines, most importantly on our covers, where the use of color serves both to attract attention and describe the contents of our cover story. All of our magazines, and particularly weekly publications such as TIME and SPORTS ILLUSTRATED, work under tight schedules where no deadline may be missed, and the editorial and artistic judgments required to get the magazine on the newsstand must be made

quickly. Unlike network television and film documentaries, we make extensive use of still photographs and graphic symbols—rather than dramatic newsreel footage or powerful soundtracks—to engage readers and convey information. Because these statutes ban color depictions of any part of this nation's medium of exchange, they severely restrict our ability to communicate on issues of great contemporary importance, and place us at a competitive disadvantage in relation to other forms of communication that use color. They do so in the name of a governmental purpose which our illustrations cannot possibly endanger. For all of these reasons, I believe they unjustifiably abridge the freedom of the press.

/s/ HENRY A. GRUNWALD
Henry A. Grunwald

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF GILBERT ROGIN

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

GILBERT ROGIN, being duly sworn, deposes and says:

1. I am the Managing Editor of SPORTS ILLUSTRATED, a Time Inc. publication, and in that capacity am the magazine's highest editorial executive. I have worked for SPORTS ILLUSTRATED since 1955, and was a writer, Senior Editor and Assistant Managing Editor before being named Managing Editor in 1979.

2. In May of this year, I have been informed, a Secret Service agent suggested to a member of Time's Legal Department that I could be criminally charged because the SPORTS ILLUSTRATED cover of February 16, 1981—showing numerous $100 bills, none entirely visible, reduced to about one-third their real size, and stuffed into a basketball net—violated a federal anticounterfeiting law. I submit this affidavit to describe the artistic and editorial judgments involved in the use of that magazine cover, and also to explain why the ability to incorporate color representations of money in SPORTS ILLUSTRATED's graphics is valuable in my work as Managing Editor.

The Story of the February 16, 1981 SPORTS ILLUSTRATED Cover.

3. In February 1981 SPORTS ILLUSTRATED developed a story documenting an important case of alleged corruption in college basketball. Players at Boston College were assertedly being paid $2,500 per player per game to "shave points"—that is, to ensure (by missing baskets, committing fouls or slowing the pace of the scoring in the game) that Boston College would win by fewer points than the "betting line" if it was favored to win, or lose by more points if it was the predicted loser. The SPORTS ILLUSTRATED story, entitled "How I Put The Fix In", was an exclusive first person account told by the scheme's matermind, Henry Hill, a convicted organized crime figure who says he made between $75,000 and $100,000 on the rigged games. His "partners" in this venture reportedly made over a quarter of a million dollars betting on the nine fixed games. Needless to say, this story—implicating members of a reputable college team, and told by someone like Hill—was the major sports news story of the week. SPORTS ILLUSTRATED therefore wanted to use a cover illustration that would let readers know we were featuring the story, and also attract the attention of people passing by the newsstand.

4. A picture of a basketball net filled with money seemed to us an ideal means to convey the full flavor of a news story

about corruption in basketball. Fortunately, I remembered that we had previously prepared such an illustration for another story about the corrupting influence of money in college basketball: specifically, an alleged recruiting violation. To produce that illustration, we had stuffed dozens of crisp new $100 bills into a basketball net until the net was full, and photographed the net as more $100 bills were floating down into it. No bill was shown in its entirety—each was covered by another bill, the net or the hoop. As we had never run the earlier story, the illustration had not been used, and it seemed the perfect cover for our exclusive report on the Boston College point-shaving scandal. (A copy of that cover is annexed to the Schwarz affidavit as Exhibit 11.)

5. In my opinion, this cover was a highly successful journalistic and artistic creation. Two concepts, basketball and money, were merged to communicate the single idea of sports corruption. The picture we used connoted money, lots of money, more money than an average college basketball player had ever seen before.

6. The cover for a story of a basketball scandal would have been trivialized by the use of phony money. The net could have been filled with "play" dollar bills, but the message conveyed by a phony cover would have been different. In the world of art, it is axiomatic that a different symbol yields a different message. The money the basketball players received to rig the games was, of course, quite real. The impact of this scandal upon the reputation of college basketball and upon people's confidence in the integrity of the game was also quite real. To have used phony money or play money would have detracted from the serious nature of the story and compromised our journalistic integrity. Our readers would not possibly understand that we could not use real money because a picture of a basketball hoop filled with *real* money—even though printed on only one side of a magazine page, and with no individual bill completely visible—constitutes a crime under the counterfeiting laws.

The Federal Law Criminalizes the Use of a Uniquely Powerful Symbol

7. As the recent SPORTS ILLUSTRATED cover vividly demonstrates, the particular graphic representation which this law forbids us from using—an illustration of currency—is valuable to people like myself who communicate through symbols. A dollar bill, whether a single or a thousand dollar bill, is in my experience, a uniquely powerful symbol. People recognize it immediately and universally. With little or no textual support, an illustration of money can suggest to a SPORTS ILLUSTRATED reader many different ideas, such as the high level of baseball salaries, purses for championship events, the amount of money bet at the Kentucky Derby, scalping of Super Bowl tickets, corruption in the world of boxing—in short, any transaction involving money. In the instance of the basketball story, we showed lots of money to suggest the power of money to corrupt human values. In that story Mr. Hill, the fixer, closed his account by answering the question of how this scandal could have happened: "The money, man, the money. That's why we all did it." Money is a powerful influence in the human experience and our picture of lots of money in a basketball net evoked, I believe, that extraordinary power.

8. I would like to add that the fact that the statutes being challenged in this case contain certain exceptions for black and white depictions of money does not diminish the statutes' harmful effects upon my efforts as managing editor. For me, the ability to work in color is of precious importance. I cannot imagine what SPORTS ILLUSTRATED would look like if we were totally prohibited from using color in our photographs and artwork. Our recent conversion to almost total color capability has, in my judgment, greatly enhanced the impact and immediacy of our presentation of sports news. Color is real; it has been an important medium of artists since humans first painted on cave walls. Particularly because our readers see most of their live sports coverage on color television or color cable, color coverage is vitally important to us. For me to be told that

there is in this world one thing—one side of a Federal Reserve Note—that I cannot interpret in color impairs my magazine's ability to perform its journalistic function. We cannot make believe that people think of money as being black and white. To communicate ideas about money to people who see the world in color we must be able to use the symbol most powerfully representing money, money itself, in the colors by which money is known.

/s/ GILBERT ROGIN
Gilbert Rogin

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,

Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.,*

Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF RAY C. CAVE

(filed July 21, 1981)

STATE OF NEW YORK,
COUNTY OF NEW YORK } ss.:

RAY C. CAVE, being duly sworn, deposes and says:

1. I am Managing Editor of TIME Magazine, a Time Inc. publication, and in that capacity am the magazine's highest editorial executive. I submit this affidavit supporting plaintiff's motion for summary judgment to explain the reasons for my objections to the law plaintiff seeks to have declared unconstitutional. As a journalist, I oppose in principle any statute

which restricts the freedom of the press to decide what kind of editorial material will be published, and to control the design and layout of editorial material. As the Managing Editor of TIME magazine, I am concerned because my employees have been threatened with criminal prosecution in the course of performing their proper duties as artists, editors, printers and journalists. After briefly describing my background in journalism, I shall explain in the following pages why TIME's editors find this law to be disturbing, foolish and unfair, and discuss the importance to TIME of the right to use color depictions of money.

Background in Journalism

2. I came to Time Inc. in 1959 as a writer for SPORTS ILLUSTRATED, specializing in articles on college basketball and golf. In 1962 I switched to editing, and served successively as SPORTS ILLUSTRATED's Senior Editor, Assistant Managing Editor and Executive Editor. After seventeen years at SPORTS ILLUSTRATED, I joined TIME Magazine in March 1976 as an Assistant Managing Editor, and was named Managing Editor in 1977.

3. Earlier in my career, I was newspaperman with the Baltimore Evening Sun. I did police and investigative reporting, was a foreign correspondent in North Africa during the hostilities in Algeria, and became Assistant City Editor of the paper.

4. Although I was not an editor at TIME magazine at the time of all of the events discussed below, I am aware of the complaints, warnings and instructions TIME has received from the Secret Service respecting its use of illustrations of money, and am familiar with the photographs and artwork about which the Service complained. After almost 30 years in journalism, I believe I understand why TIME's editors and artists elected to use those illustrations, and I certainly understand how and why the law challenged in this action unjustifiably constrains freedom of expression.

Money Is a Commonly Used but Uncommonly Powerful Journalistic Symbol

5. The statutes involved here tell me and my fellow journalists that we have committed a crime if we use a particular symbol—a representation of any part of a piece of currency, no matter how small, distorted or abstract—to communicate to our readers. The illustrations of currency actually used by TIME magazine show why these statutes have no logical merit. Even though every picture or artist's rendering of currency that TIME has used showed money in a distorted fashion, and was printed on one side of lightweight magazine paper, we have been told by the Secret Service that our pictures violate the anticounterfeiting law.

6. For example, the December 14, 1970, cover of TIME showed the picture of George Washington from a dollar bill, enlarged to five times its original size, with a green tear running down Washington's cheek. Superimposed on the picture were the phrases "WORTH 73¢" and "The Battle of the Buck". (A copy of this cover is annexed to the complaint as Exhibit A and to the accompanying Schwarz affidavit as Exhibit 4.) This cover conveyed two ideas effectively and efficiently: that the cover story was about inflation and the reduced value of the dollar; and that this problem was, in the editorial judgment of TIME, serious enough to disturb the historical foundations of the country. Yet an agent of the Secret Service informed us that our use of this illustration was criminal.

7. A second example, the TIME cover of February 23, 1976, contained a black and white photograph of a $1,000 Federal Reserve Note being passed from one hand to another with a drawing of a thumb obscuring much of the bill. This artwork was accompanied by the words "The Big Payoff" and "Lockheed Scandal: Graft Around the Globe". (A copy of this cover is annexed to the complaint herein as Exhibit C and to the accompanying Schwarz affidavit as Exhibit 6.) Again, the message conveyed by the cover was graphic and powerful —American money, in denominations larger than those known to the average citizen, was passing from one hand to another

for unlawful purposes. Yet a lawyer for the Secret Service told us our use of this photograph was criminal.

8. A third example was the TIME cover of November 1, 1976, which contained a photograph of a hand clutching several Federal Reserve notes, including a one dollar bill, two ten dollar bills and a twenty dollar bill. This hand was in the "thumbs-up" position and a second hand was shown in the "thumbs-down" position. The text on the cover read, "Voting Your Pocketbook: Are Things as Good as Ford Says? Or as Bad as Carter Says?". (A copy of this cover is annexed to the complaint herein as Exhibit D and to the Schwarz affidavit as Exhibit 8.) This artwork conveyed many thoughts, including the difficult individual choice on election eve, the individual citizen's strained economic circumstances, the small denominations of money average Americans hold onto tightly, and the debate between the presidential candidates on how well or badly off Americans found themselves in 1976. The Secret Service informed us that this cover violated the law; that we were trying the government's patience by continuing such criminal behavior; and that if TIME failed to comply with the anticounterfeiting law in the future, the matter would be referred to the United States Attorney for prosecution.

9. These three TIME covers provide vivid illustrations of the symbolic power of highly stylized representations of currency. The depiction of money—a symbol whose inherent meaning was, in each instance, enhanced through creative distortion—was an integral part of the cover's concept. Yet even though what we did bore no conceivable relationship to counterfeiting, we were informed we had violated the anticounterfeiting laws. Such an interpretation of the law was surely never intended by the Congress; the illustrations could not conceivably have been used for counterfeiting purposes.

The Issues Involving Money Are Increasingly Important News Stories

10. Few news stories today are as important to the readers of TIME as stories about money—inflation, unemployment,

high interest rates, the debate over the Federal budget, the state of American business, the declining value of the dollar against foreign currencies, the increasing competition between foreign and domestic goods. These issues are not solely the concerns of economists and businessmen, for they affect every one of our readers directly and forcefully. There is no mystery in the sudden popularity of books on how to "beat" inflation, hedge against coming economic problems or take advantage of investment opportunities. These issues are commonplace concerns of our readers and receive increasingly in depth treatment in the pages of TIME.

11. As such issues come to occupy center stage in the political and social forum, news magazines need to make increasingly greater use of the graphic symbols that represent these issues. One of the best and most effective symbols to represent ideas about money is money itself, as transformed and interpreted by photographers and artists.

The Statutory Prohibition of Color Illustrations Particularly Hampers Our Ability To Communicate

12. I am aware that the statutes being challenged in this lawsuit contain exemptions designed to accommodate "educational" or "newsworthy" uses of some black and white illustrations of currency. It is my opinion that these exemptions do not provide the editorial latitude needed to express ideas through the symbolic use of money. In addition, I believe only we at TIME should have the power—and the duty—to judge what will be educational or newsworthy for our readers.

13. Freedom to express ourselves by using color illustrations when we feel they are appropriate is particularly important to TIME, which takes special pride in being the first news weekly to provide its readers with extensive color coverage of the news. The statutory requirement that we use only black-and-white representations of currency (which must also be larger than one and one-half the size, or smaller than three quarters the size, of a real United States note) obviously

restricts that freedom. At one time, of course, all magazines were printed in black and white. But today, color photographs and color artwork have become indispensable to magazine journalism. Both TIME and its main competitor, NEWSWEEK, have greatly increased their use of color. The government is not being responsive to journalistic needs by only granting permission to print some pictures of money in black and white.

14. The importance of color to TIME must also be understood in terms of our relationship to other forms of communication. Today almost all movies are filmed in color. Television news is almost exclusively shown in color. The consumers of news and ideas increasingly expect that visual communications will be in color. For example, it would be jarring and contrary to the normal human experience if the one dollar bill actually used by President Reagan in his televised address on the economy, or the fifty dollar bill actually used by Chrysler Corporation to attract car buyers in its television ads, were shown on television in black and white. Just as the President's and Chrysler's ability to communicate with the public would be greatly hampered by a statutory prohibition of their individual decisions to use a color object, the prohibition applied to TIME diminishes our ability to communicate with our readers.

As Applied to TIME, This Statue Serves No Purpose, but Restricts Our Ability To Express Editorial Viewpoints

15. It is difficult to understand why the government finds our use of photographs of money to be illegal—particularly when we never show paper currency full-sized and without some distortion, and always print our illustrations on only one side of a page. As the affidavits of Messrs. Hoglund, Rogin and Campbell show, no anticounterfeiting purpose can be served by prohibiting our use of these photographs. In addition, it is disturbing that the government, for whatever reason, seeks to engage in a tacit censorship of TIME by encouraging us to

obtain prior approval of our graphic representations of currency. On a practical level, the requirement of prior government approval is unworkable in the context of a weekly news magazine, where most editorial decisions must be made very quickly. On a more fundamental level, government censorship, no matter how well intended as an effort to enforce an illogical and unnecessary statute, offends this country's tradition of freedom of the press. I know of no other area of expression where prior approval by the government is suggested or required. Such a requirement is particularly inappropriate where the "offending" material is as harmless as the artistic interpretation of United States currency found in TIME magazine.

/s/ RAY C. CAVE
Ray C. Cave

[Subscribed and Sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF RUDOLPH HOGLUND

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RUDOLPH HOGLUND, being duly sworn, deposes and says:

1. I am the Art Director of TIME Magazine, a Time Inc. publication. I submit this affidavit supporting plaintiff's motion for summary judgment to discuss two subjects. First, I wish to explain why it is important to me as an art director and journalist at TIME to express ideas through the use of symbols,

and particularly, symbolic representations of money. Second, I wish to point out several reasons why TIME's artistic use of images of money cannot serve any purpose for a would-be counterfeiter. My background and training are briefly summarized in the next paragraph.

2. I joined TIME Magazine as Assistant Art Director in 1977, and have been Art Director since June 1980. Before coming to TIME, I was Art Director of MORE Magazine in 1976-77; Design Director and then Art Director for Newspaper Enterprise Association from 1973 to 1976; an artist for NEA from 1960 to 1967; and an art director for Penn and Hamaker, an advertising agency in Cleveland, Ohio, from 1967 to 1972. During my service at NEA, I worked in close association with its production personnel and facilities, and I am fully familiar with the magazine production process.

The Artistic Importance of Currency as a Symbol

3. At TIME as at other news magazines, a principal responsibility of the Art Department is to crystallize the news and highlight thoughts expressed in text by representing ideas, events and human emotions through photographs and other artwork. Since symbols are, by definition, objects which stand for ideas, they are among the primary tools of my trade. In the hands of a talented artist, even commonplace objects can be developed into unusual and striking symbols with tremendous communicative power. At TIME, we use them in many different forms—photographs, sketches, graphs, cartoons, and so on—to deliver the news to our readers colorfully and precisely.

4. In my experience, paper money is a peculiarly powerful symbol. People recognize it immediately and universally. With little or no textual support, a picture of any piece of currency can communicate ideas about the economy, the toll of inflation, the world of finance, the high cost of living—in short, any story in which money plays a role. By combining it with other artwork, satirizing its form, exaggerating a portion of it, or

displaying it in unconventional environs, money can be interpreted artistically to convey a great many important concepts.

5. Currency is a particularly valuable symbol at TIME for several reasons. First, an illustration of currency can be used to capture and explain specific ideas about some very complex and highly abstract news subjects. Like nearly all our readers, I cannot pretend to understand all the mysteries of the Federal budget. However, a picture of a dollar bill transformed by an artist into a bar graph showing how taxpapers' tax dollars are spent by the government is, in an old cliche, worth a thousand words. So, too, the causes of inflation and its impact on our society are difficult for the average person to comprehend, but artistic depictions of the "shrinking dollar" are often extremely useful in conveying the magnitude and effects of inflation to the public. Although these seem to me rather straight-forward artistic uses of a commonly understood symbol, I am told it may be criminal to include them in an edition of TIME.

6. Secondly, currency is a valuable symbol for an artist because it deals with very basic human emotions. Greed, avarice, the lust for the power that money brings, the temptation that is posed by easy money, can all be conveyed effectively and dramatically through the symbol of money itself. For example, few images are as vivid from the days of the Watergate scandal as the image of men carrying paper bags full of $100 bills to be used as hush money. Similarly, the picture of a United States Congressman stuffing his coat pocket full of money received from a supposed Arab sheik graphically captures the Abscam story. Artists employed by news magazines covering such stories need to be free to use such valuable graphic devices without risking prosecution ourselves, and the government's interference with our ability to do so is both puzzling and troubling.

The Currency Illustrations Used by TIME Can Be of No Aid to a Counterfeiter

7. As is generally true when a commonplace object is artistically represented as a symbol, it is often necessary to *do*

something with a picture of money in order to convey a particular message. That is, when used as a symbol, money may be exaggerated, reduced, twisted, distorted, covered, colored, or otherwise altered to say what the artist wants to say. Three recent uses of currency illustrations in TIME provide good examples of my point. TIME's December 14, 1970, issue used a blow-up of George Washington's portrait from a one dollar bill to illustrate a story about inflation. (A copy of this picture is annexed to the Complaint as Exhibit A, and is annexed to the accompanying Schwarz affidavit as Exhibit 4.) This depiction of currency was obviously not true to size, and was also altered by exaggerating the green color, adding a teardrop in Washington's cheek, and superimposing the words "Worth 73¢". Similarly, the February 23, 1976, TIME cover depicted a $1,000 note being passed from one hand to another to illustrate a story on international bribery. (A copy of this cover is annexed to the Complaint as Exhibit C and to the accompanying Schwarz affidavit as Exhibit 6.) Again, the note was partly obscured by the addition of a cartoon thumb. Finally, the November 1, 1976, TIME cover showed several bills of small denominations, clutched in someone's hand, to illustrate a story emphasizing the role of inflation as a major campaign issue. (A copy of this cover is annexed to the Complaint as Exhibit D and to the accompanying Schwarz affidavit as Exhibit 7.) The photographer's decision to show the hand grabbing these well-worn bills very tightly successfully emphasized the inflation squeeze for most citizens. Yet although the pictures of money were significantly distorted on all of these covers, I am informed that TIME was told by the Secret Service that in using them the magazine had violated the anticounterfeiting laws.

8. It is also useful to note that in the case of money, as with other everyday symbols, artistic distortion is often needed to correspond to imagined reality. Although the front of a dollar bill or any other piece of United States paper currency is mostly black and white, with some green and occasionally some red, people *think* of money as green. And the Court will notice that in 2 of the 3 examples listed above—the picture of Washington

and the tightly-held bills—the green colors in the illustrations were quite exaggerated. This slight distortion of reality was useful to produce images more striking than accurately colored representations would have been.

9. A final point further demonstrates why the use of currency illustrations by TIME's artists cannot create any practical danger to the public. The process of making magazines and the process of making money are so fundamentally different from each other that the tools used in four-color magazine printing would be useless to someone desiring to counterfeit currency. The color positives used by TIME to produce covers are merely photographs of money—and anyone can take a picture of a dollar bill without using TIME's pictures. The four-color plates used by TIME are also worthless to the would-be counterfeiter—individually they are worthless, because all four are needed to reproduce the colors, and even if one had access to all four plates, all one could produce would be a TIME cover. It would have the TIME logo, the date, and the printed overlays, as well as, for example, the tear in George Washington's eye as in our December 14, 1970, cover, or the graphic illustration of a thumb over the thousand dollar bill of our February 23, 1976, cover. And although to my knowledge TIME has never printed a cover depicting unaltered, unobscured, true-to-size, true-color currency, even if such a cover existed, the plates used to make it would be useless to the aspiring counterfeiter because they would be four-color offset plates, not engraving plates. In short, to reproduce engraved currency, access to TIME's four-color plates rather than engraving plates does nothing for a counterfeiter.

/s/ RUDOLPH HOGLUND
Rudolph Hoglund

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF RONALD N. CAMPBELL

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RONALD N. CAMPBELL, being duly sworn, deposes and says:

1. I am the Art Director of FORTUNE Magazine, a Time Inc. publication. I submit this affidavit in support of plaintiff's motion for summary judgment to set forth some of the reasons why the right to publish illustrations of currency is important to FORTUNE, and to discuss two recent examples which demonstrate both the journalistic value of this particular symbol and the constraints imposed by the criminal law challenged in this lawsuit.

2. I joined the FORTUNE Art Department in 1952 and became Art Director in 1974. Prior to that I had been Associate Art Director. I am a member of the Society of Illustrators and the Honorary Board of the Society of Publication Designers, and have won numerous awards for my work.

The Importance to FORTUNE of Graphic Representations of Currency

3. FORTUNE's editorial content places special emphasis on the economy and the financial affairs of the business world. Our magazine is devoted principally to the presentation of news, analysis and commentary concerning economic and financial matters, and developments in domestic and international business affairs.

4. FORTUNE attempts to bring an added dimension to its stories through graphic designs which complement the text and attract the attention of readers. When our text concerns certain issues relating to money, the best graphic device to symbolize and convey the message of the text is often an illustration of money itself. Because the uses and influence of money are so central to our subject matter, to deny FORTUNE the opportunity to use color depictions of currency is to eliminate an extremely valuable tool of our trade. The value of this uniquely versatile symbol to FORTUNE is perhaps best revealed by considering two artistic uses of currency illustration, prepared under my direction, which were said to be forbidden by the Federal law.

Two Examples of the Value of Currency Illustration to FORTUNE and the Foolishness of the Prohibitions

5. In February 1979, FORTUNE ran a major story on "America's Invisible Rich". The cover for that issue portrayed a stack of paper money folded within a gold Buccellati horseshoe-shaped money clip inlaid with diamonds. The bill on top—the only Note visible—was a $1,000 bill, of which about one-third of the reverse side was shown. (A copy of this cover is attached to the accompanying Schwarz Affidavit as Exhibit 10.) I believe that this illustration, which was intended to suggest that some people in the United States carry $1,000 bills in their pockets as routinely as most of us carry singles, captured and conveyed the message of the story with outstanding impact and clarity. Yet, even though the illustration showed only a small fraction of an uncommonly large bill, blown up to more than five times actual size, and largely

covered by the horseshoe money clip. I am told we were accused of violating the Federal anticounterfeiting laws by publishing it.

6. A second example reveals how the Federal law has frustrated our objectives as journalists. In 1977 FORTUNE ran a story about a certain company whose "cash rich" position created opportunities closed to other firms, but required the company to make wise investments in order to maintain its earnings record in the future. To capture the essence of the difficult choices confronting that firm, our Art Department designed a photograph depicting a "landscape" of distorted blow-ups of $100 Federal Reserve Notes leading to a series of open doors set against the sky. (A copy of this illustration is attached to the accompanying Schwarz Affidavit as Exhibit 2.) In our judgment, the photograph was extremely effective—but we were advised by the Treasury Department that we couldn't use it because it would violate the Federal anticounterfeiting law. We therefore changed the illustration, using coins instead of bills to create the "landscape". (A copy of the substituted illustration is annexed to the Schwarz Affidavit as Exhibit 3.) I believe the journalistic and artistic purposes of the picture were largely defeated as a result of that change: a company is not understood by our readers to be cash rich if it counts its wealth in coins. Because the message of our article was contradicted by the message of the accompanying photograph, the journalistic impact of the graphics was undermined by the Government's censorship.

/s/ RONALD N. CAMPBELL
Ronald N. Campbell

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

[Affidavit of Service of this and the five preceding affidavits omitted in printing.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AMENDED ANSWER

(filed August 28, 1981)

Defendants Donald T. Regan, William French Smith, James D'Amelio, H. Stuart Knight, and John S. Martin, Jr., by their attorney, John S. Martin, Jr., United States Attorney for the Southern District of New York, answer as follows upon information and belief the numbered paragraphs of the Complaint herein:

1. Deny, except admit that plaintiff seeks to bring the described action pursuant to the statutes alleged.

2-7. Admit.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8.

9. Admit that on the stated dates plaintiff's publications have included illustrations of United States obligations or portions thereof. Defendants respectfully refer the court to the cited magazine covers for the nature of the illustrations and for a determination as to their purposes.

10. Admit that chapter 25 of title 18 is a penal statute. Defendants respectfully refer the court [to] the cited statutes for their content and purposes.

11. Admit that 18 U.S.C. § 474 ¶6 exists and is interpreted by defendants to mean what it says. Defendants object to plaintiff's characterizations of the statute and deny plaintiff's interpretations thereof.

12. Admit that defendants interpret 18 U.S.C. §474 ¶6 on the basis of its content except aver that when read in concert with 18 U.S.C. §504 ¶6 does not prohibit the expression of information, opinions or ideas through the use of United States currency: section 504 sets forth specific criteria which such illustrations must fulfill in order to be lawful. Admit that plaintiff faces a non-specific possibility of prosecution and forfeiture for continued violation of 18 U.S.C. §474. Defendants aver that plaintiff has been advised that certain illustrations of currency which have appeared in its publications are in violation of section 474 thereby subjecting plaintiff to a possibility of prosecution, but defendants deny that any threats of prosecution have been made.

13. Admit, except respectfully refer the court to the cited statute for its contents.

14. Admit that the quoted words are not specifically defined in the statute but aver that their meaning is clear on the face of the statute. Defendants respectfully refer the court to the cited statute for the contents thereof. Defendants aver that the risk of "sanctions" encountered by the plaintiff turns on the judgment of the courts as is true with the interpretation of all

criminal statutes. Defendants admit that in the opinion of the Department of the Treasury section 504 prohibits illustrations used primarily for decorative or eye-catching purposes and also requires that an illustration permitted by the section be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Deny the defendants' construction of the statute exceeds the scope of its prohibition.

15. Deny, except admit that the Secret Service has had contact with plaintiff concerning various possible violations of section 474 and advised plaintiff that in the opinion of the Department of the Treasury certain reproductions of United States obligations were in violation of the law.

16-19. Deny.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim for which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

This court lack[s] subject matter jurisdiction to entertain this action.

THIRD AFFIRMATIVE DEFENSE

This case does not present a justiciable case or controversy.

Except as hereinbefore expressly admitted or denied, defendants deny knowledge or information sufficient to form a belief as to the truth of each and every allegation of the complaint.

WHEREFORE, defendants respectfully demand judgment dismissing the complaint and awarding defendants their costs and such other and further relief as is just or proper.

Dated: New York, New York
August 27, 1981

JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York

By: /s/ TWILA L. PERRY

Twila L. Perry
Assistant United States Attorney
Office and Post Office Address
One St. Andrew's Plaza
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

SUPPLEMENTAL AFFIDAVIT OF FREDERICK A. O. SCHWARZ, JR.

(filed September 29, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FREDERICK A. O. SCHWARZ, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Cravath, Swaine & Moore, attorneys for plaintiff Time Inc. ("Time"). I submit

this supplemental affidavit in support of plaintiff's motion for summary judgment, (a) to set forth facts relating to a television news broadcast aired after the filing of this motion, which further reveals the irrationality of the challenged Federal statutes; and (b) to comment, as a practicing member of the Bar, on defendants' thesis that a publisher accused of crime by Federal law enforcement agents must await prosecution before it is allowed to challenge the constitutionality of the law that criminalizes its editorial material.

The Irrational Distinction Between Film and Print: The WNEW-TV News Broadcast of July 29, 1981, and SPORTS ILLUSTRATED's "Point-Shaving" Story

2. As has been more fully described in my previous Affidavit of July 20, 1981, and in the Affidavit of Gilbert Rogin dated July 17, 1981, SPORTS ILLUSTRATED magazine—a periodical published by plaintiff—featured in its February 16, 1981 issue an exclusive story about a "point-shaving" scandal in college basketball, as recounted by the scheme's mastermind, Henry Hill. For reasons Mr. Rogin has explained, the editors and art directors of SPORTS ILLUSTRATED chose to highlight that story on the cover of the February 16 issue by means of a photographic reproduction in color of portions of many dozens of $100 bills, reduced to approximately one-third actual size, overlapping each other and stuffed inside or descending into a basketball hoop and attached net. (A copy of that cover is annexed to the Complaint herein as Exhibit F, and to my previous Affidavit as Ex. 11.) On May 18, 1981, shortly before this action was commenced, Time was advised by an agent of the Secret Service that in the opinion of the Department of the Treasury, SPORTS ILLUSTRATED's February 16 cover violated the Federal anticounterfeiting laws; that the plates and other materials involved in its production must be seized; that the names and addresses of all persons involved in the preparation of the cover must be delivered to the Service; and that the agent wished to question a member of Time's management in the presence of counsel.

3. Almost immediately after the submission of plaintiff's motion papers, the Boston College "point-shaving" scandal was covered by the broadcast media in a manner which confirms SPORTS ILLUSTRATED's judgments as to both the importance of the story to the public and the most effective means of conveying it. Thus, on July 29, 1981, the sports news broadcast of the Ten O'Clock News on WNEW-TV featured a report of the indictment, earlier that day, of five persons allegedly connected with the "point-shaving" scandal. (A script of the broadcast, prepared by Radio TV Reports, Inc., 44 East 42nd Street, New York, N.Y. 10017, is annexed hereto as Exhibit A.) To illustrate their own story of the latest developments in the scandal, the editors of WNEW-TV chose none other than the allegedly criminal cover of the February 16, 1981, issue of SPORTS ILLUSTRATED magazine.

4. As Messrs. Chris Jones and Bob O'Brien read on the air the news of the day's indictments for racketeering and sports bribery, *see* Ex. A, p. 2, the camera slowly scanned SPORTS ILLUSTRATED's dramatic picture of the basketball net filled with money; focused briefly on some portraits and an artist's sketch of the courtroom; and returned to SPORTS ILLUSTRATED's cover for the close. Hence, in the medium admittedly favored with far greater capability for gripping visual expression than a printed magazine, the most compelling means of conveying the essence of a story about money was adjudged by its own journalists to be SPORTS ILLUSTRATED's picture of money itself.

5. Ironically, although it was allegedly a crime for SPORTS ILLUSTRATED to publish the illustration shown on its February 16, 1981 cover, it was *not* unlawful for WNEW to show SPORTS ILLUSTRATED's allegedly unlawful cover on the air. Under Title 18, U.S.C. § 504(2), the broadcast media are broadly exempted from the prohibitions of Title 18, U.S.C. § 474, and permitted to use films and slides depicting illustrations of United States currency, in all sizes and colors, for all purposes except advertising.

6. Plaintiff submits that in addition to all its other constitutional infirmities, a Federal law which creates such an irrational distinction between criminal and noncriminal conduct cannot be sustained under the Constitution.

Defendants' Thesis of "Justiciability"

7. In response to plaintiff's motion for summary judgment, defendants have taken the position that plaintiff has failed to present a constitutional "controversy", notwithstanding the undisputed history of harassment and accusation Time has suffered at the hands of the Secret Service and the Treasury Department. The reasons why this contention is unsupportable as a matter of law are set forth at pp. 32-39 of plaintiff's supplemental memorandum in support of its motion. In addition, however, I wish to call the Court's attention to the anomalous posture in which members of the Bar would be cast if defendants' argument were deemed to bear any merit.

8. As set forth in detail in my previous Affidavit, my client has been routinely berated by Federal law enforcement officials for engaging in a form of expression which it deems essential to the proper exercise of its role as a member of the press, and believes to be protected by the United States Constitution. No member of any relevant Federal agency—including, now, the Department of Justice and the Office of the United States Attorney—has ever taken the position that this form of expression is *not* a crime for which Time may be prosecuted. Indeed, in the course of our discussions respecting the briefing schedule for this motion, counsel for defendants expressly declined to agree that Time would not be prosecuted even during the pendency of this action.

9. As further indicated in my previous Affidavit, in view of the increasing importance to Time of the photographs and artwork at issue, and in view of Time's increasing concern about the jeopardy to its employees, I advised Time to commence this lawsuit, to clarify the fact that defendants cannot constitutionally interfere with the editorial content of its publi-

cations. The only conceivable alternative—to cease printing illustrations that Time wishes and needs to print, so long as these statutes remain in the United States Code—was necessarily rejected as an untenable course.

10. Defendants now suggest that there was, in fact, a third course. If their theory of constitutional adjudication is accurate, the proper advice to Time was to continue in a course of conduct Federal officers have labelled criminal, and await the opportunity for vindication at the pleasure of the Justice Department—*after* Time was indicted, its property seized, and its employees very probably deprived of their liberty.

11. It cannot be the calling of a lawyer in our system to counsel disregard for the advice and warnings of officers of the Federal Government. Nor can it be the calling of a lawyer to counsel sacrifice of rights secured by the Constitution. As I understand it, the responsibility to identify the lines of demarcation between governmental power and individual right is one of the central missions of the judiciary; my role as a lawyer compels me to counsel anyone who asks that the proper redress for individual wrong lies in recourse to the courts.

/s/ FREDERICK A. O. SCHWARZ, JR.
Frederick A. O. Schwarz, Jr.

[Subscribed and sworn to
September 29, 1981.
(Jurat omitted in printing)]

[Affidavit of Service omitted in printing.]

Exhibit A to Supplemental Schwarz Affidavit

[Letterhead omitted in Printing]

FOR
DRESSEL & ALTMAN

PROGRAM
TEN O'CLOCK NEWS

STATION
WNEW-TV

DATE
JULY 29, 1981, 10:00 P.M.

CITY
NEW YORK

BROADCAST EXCERPT

CHRIS JONES: For anyone who bets on sports, it is not who wins or who loses. It's by how much that counts. That's because the amount of money you win or lose, actually whether you win or lose or not, depends on the amounts of points separating the winning and losing teams. If you bet on sports, you know what I am talking about.

In basketball, that spread can be fixed by a few poorly-aimed shots. Today, five men, one a former Boston College basketball star, were indicted on charges they tried to fix some college basketball games.

BOB O'BRIEN: In January of this year, word got out that Federal lawmen were digging into possible point-shaving during the 1978-'79 season at Boston College. Then in February, the man who admits to masterminding the scheme told how he did it in a cover article in Sports Illustrated magazine.

Henry Hill says he paid three Boston College basketball players about ten thousand dollars each to shave points in nine games. Hill claims he raked in close to 100 thousand dollars betting on those games, and his associates made over a quarter million. Hill named Rick Kuhn as the first player to join the fix and said that Kuhn got teammate Jim Sweeney involved from the start and later convinced Boston College star guard, Ernie Cobb, to take part in the caper.

Hill did all this fancy story-telling after becoming a government informer, following his arrest on drug charges in 1980. Hill is also said to be one of the masterminds of the 1978 heist at the Lufthansa cargo terminal at Kennedy Airport that netted thieves six million dollars in cash and jewels.

Another reputed Lufthansa mastermind, James "Jimmy the Gent" Burke, was one of the five indicted today in the point-shaving case. Rick Kuhn was the only one of the Boston Colleges players named in the Sports Illustrated article who was charged today with racketeering and sports bribery.

KEN WALTON (F.B.I.): Two men met in jail, Henry Hill and James Burke. This was prior to 1978. When Hill got out of jail, he went and looked up Burke, who was in Pittsburgh. Burke at that time was a friend of a guy by the name of Paul Mazey. Mazey, in turn, was connected, through friendship, with two other individuals by the name of Tony and Rocco Polla. One of the Polla brothers had played—had gone to school with Rich Kuhn, a player on the Boston College basketball team. They all got together and said there is a way to make money, and the way to make money is to shave points.

O'BRIEN: So what of the other two players informant Hill claims he paid off to shave points. Team co-captain Jim Sweeney reportedly was granted immunity from prosecution and testified before the Federal grand jury investigating the alleged schemes. Ernie Cobb, now touring with the Harlem Wizards, reportedly is still a target of the Federal probe. Lawmen hope that Henry Hill will be their star witness when the case comes to trial. To make sure he survives in the interim, the F.B.I. has given Hill a new identity and a place to hide out, under the Federal witness protection program.

Bob O'Brien, Channel 5 News.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York,
Defendants.

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81 Civ. 3218 (VLB)

OPINION

(Filed June 4, 1982)

VINCENT L. BRODERICK, U.S.D.J.

[Appearances omitted]

I.

This civil action, in which plaintiff seeks declaratory and injunctive relief, involves a challenge to the constitutionality of

two provisions of the federal anti-counterfeiting laws that either prohibit or regulate the publication or production of any likeness of United States currency. Jurisdiction of this court rests on 28 U.S.C. § 1331, as amended Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369. Declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202 (1976).[1]

Plaintiff Time Inc. ("Time") is a New York corporation with its principal place of business in New York City. It publishes various periodicals—*Time, Fortune, Sports Illustrated, Life, Money, People,* and *Discover.*[2] Defendants are

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[1] 28 U.S.C. § 2201, captioned "Creation of remedy," provides that:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202, captioned "Further relief," provides that:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Both sections are procedural in nature, designed to simplify the ascertainment of uncertain rights, *Coomes* v. *Adkinson,* 414 F.Supp. 975 (D.S.C. 1976), and neither serves as an independent predicate for federal court jurisdiction. *Donahue* v. *Butz,* 363 F.Supp. 1316 (N.D. Cal. 1973). Sections 2201 and 2202 may be resorted to for additional remedies in situations where jurisdiction already exists. *Terminal Freight Handling Co.* v. *Solien,* 444 F.2d 699 (8th Cir. 1971), *cert. denied,* 405 U.S. 996 (1972). Plaintiff properly invokes §§ 2201 and 2202 as there exists an independent basis for jurisdiction, namely 28 U.S.C. § 1331.

[2] *Fortune* and *Money* focus primarily on matters pertaining to finance and the economy, while the other magazines report from time to time on financial matters and issues (*Time* and *Life*), or may refer from time to time to such matters and issues in the course of treating the areas in which they specialize (*Sports Illustrated, People,* and *Discover*).

various United States Government officials who are statutorily charged with the administration and enforcement of the counterfeiting laws of the United States.[3]

Plaintiff alleges that the challenged provisions are overbroad and void for vagueness, and that they impermissibly infringe upon plaintiff's First Amendment rights of freedom of speech and of the press.[4] Plaintiff has moved and defendants have cross-moved for summary judgment. Fed.R.Civ.P. 56.

II.

The United States Constitution grants Congress broad power to legislate to "coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures," art. I, § 8, cl. 5, and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." art. I, § 8, cl. 6. The power to coin money has been long recognized as carrying the correlative power to protect it. *United States* v. *Marigold*, 50 U.S. 560, 9 How. 560 (1850). The *Marigold* Court upheld an Act of Congress, 4 Stat. at Large

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[3] Donald T. Regan is Secretary of the United States Department of the Treasury, responsible for the enforcement of the laws of the United States which define, and provide for the punishment of, counterfeiting and forgery of United States currency. H. Stuart Knight is Director of the United States Secret Service, a division of the Department of the Treasury, and is responsible for the detection and arrest of persons who violate federal counterfeiting laws. William French Smith is the Attorney General of the United States, responsible for the administration of the United States Department of Justice, including its activities with respect to the nation's penal laws. James R. D'Amelio is Special Agent in Charge of the New York Field Office of the United States Secret Service. John S. Martin, Jr. is the United States Attorney for the Southern District of New York.

[4] The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

121, ch. 65, providing for the prosecution of those involved in counterfeiting any coin in the resemblance of United States currency.

Chapter 25 of Title 18 of the United States Code contains those laws which prohibit the alteration, counterfeiting or forgery of the coins, obligations and securities of the United States Government and of foreign governments, and which provide criminal sanctions with respect to such activities.

This case involves the impact of two of the provisions of Chapter 25—the sixth paragraph of § 474, and § 504.

1. 18 U.S.C. §474.

18 U.S.C. § 474 (1976) is one of 39 sections in Chapter 25, and is captioned "Plates or stones for counterfeiting obligations or securities."[5] Paragraphs one through five and paragraph

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[5] 18 U.S.C. § 474 reads as follows:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other things, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or
>
> Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or
>
> Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or
>
> Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use

seven of § 474 criminalize the possession, use, importation, sale and forgery of materials which can actually be used for counterfeiting purposes, such as plates, stones and paper. The sixth paragraph of § 474, one of the provisions challenged herein, makes it a crime to create a photograph, print or impression of "any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States":

* * *

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other

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such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

June 25, 1948, ch. 645, 62 Stat. 706.

> security,[6] or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States;
>
> • • •
>
> Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. § 474 ¶ 6.

Section 474 traces its roots to Section 11 of "An Act to provide Ways and Means for the Support of the Government, and for other Purposes," ch. 172, 13 Stat. 218, 221-222, which was enacted on June 30, 1864.

Drafted as a measure to raise money for the War Between The States, the Act provided, *inter alia*, for the issuance of various federal obligations, and it set forth penal provisions with respect to the counterfeiting and forgery of federal obligations. Thus Section 10 of the Act provided criminal sanctions against the forgery, counterfeiting or alteration of United States obligations and the passing or uttering of counterfeits. Section 12 made it a federal crime to possess without lawful authorization "any engraved or transferred plate, block, or electrotype" from which U.S. obligations were or would be made; or any die, roll, or original work used in the making thereof; or any materials made "after the similitude" thereof.

Section 11 of the 1864 Act is the ancestor of Section 474. The sixth paragraph of Section 474 traces its genesis to the following language of Section 11:

> . . . if any person shall print, photograph, or in any other manner make or execute, or cause to be printed, photo-

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[6] The antecedent of the words "any such obligation or other security" in the sixth paragraph of Section 474 appear in the fifth paragraph of Section 474, and are quoted in this opinion immediately before the text of the sixth paragraph. *See* fn. 5, *supra*, for full text of Section 474.

> graphed, or in any manner made or executed, or shall aid in printing, photographing, making, or executing any engraving, photograph, or other print or impression in the likeness or similitude of any obligation or other security, or any part or parts thereof, or shall vend or sell any such engraving, photograph, print, or other impression, except to the United States, or shall bring into the United States from any foreign place any such engraving, photograph, print, or other impression, except by the direction of some proper officer of the United States . . . every person so offending shall be deemed guilty of a felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, or by imprisonment and confinement at hard labor, not exceeding fifteen years, or by both, in the discretion of the court.

The proceedings of the 38th Congress shed virtually no light on its intent with respect to the anti-counterfeiting sections of the 1864 Act. The sole reference to § 11 in the course of the House pre-enactment consideration of the Act pertained to a modification of the sentence and fine provisions, which was made. There was apparently no significant discussion of § 11 in the Senate.

But Section 11 of the statute passed in 1864 to help finance the Union in the War Between the States is, in substance, the law of the United States today. With minor changes in language, it was re-enacted as § 5430 of the Revised Statutes of 1878, Tit. LXX, ch. 5, Rev. Stat. 1052 (December 1, 1878), and re-enacted again as § 150 of the codification of 1909, ch. 321, 35 Stat. 1116 (March 4, 1909). As revised in 1909, the substance of Section 11 made its way through the first three editions of the United States Code; it was re-enacted once again with minor changes in phraseology in the 1946 recodification of the penal laws, *see* ch. 645, 62 Stat. 706 (1948), and appears in that form in Section 474 of Title 18.

2. 18 U.S.C. § 504.

18 U.S.C. § 504 (1976), which is the second provision challenged in this action, was substantially amended in 1958 to

provide certain statutory exemptions to the flat ban of § 474. Notwithstanding the prohibitions contained in the sixth paragraph of § 474, § 504 permits the printing or publishing "of illustrations" of United States currency "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers or albums." Such illustrations must be "in black and white", and they must be "of a size less than three-fourths or more than one and one-half, in linear dimension," of the currency illustrated. Excepted from these requirements are motion-picture films, microfilms or slides for screen projection or telecasting.[7]

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[7] 18 U.S.C. 504, captioned "Printing and filming of United States and foreign obligations and securities," reads as follows:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making of importation of the necessary plates for such printing or publishing, or illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,
>
> for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;
>
> (ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this

The legislative history indicates that Congress intended in § 504 merely to institutionalize the practices of the Treasury Department:

> The Secretary of the Treasury, under the authority vested in him by title 18, United States Code, section 474, has normally as a matter of practice for many years made exceptions to the statute by granting special permission to use illustrations of United States bonds and paper money for numismatic, historical, and educational purposes. To prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money.
>
> It is the opinion of the Treasury Department that the printing in publications of black-and white illustrations of

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paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term "postage stamp" includes postage meter stamps.

June 25, 1948, ch. 645, 62 Stat. 713; Sept. 2, 1958, Pub.L. 85-921, § 1, 72 Stat. 1771; June 20, 1968; Pub.L. 90-353, § 1, 82 Stat. 240; Oct. 14, 1970, Pub.L. 91-448, § 2, 84 Stat. 921.

> paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting. Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired. A provision is included to require that the negatives and plates used in making the illustrations shall be destroyed after their final use for the purpose for which they were made. Such a requirement has formerly been imposed in cases where the Secretary of the Treasury has granted special permission as a precautionary measure and to avoid investigations of alleged violation where plates and negatives were legitimately made but were merely discarded instead of being destroyed.

S. Rep. No. 2446, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 5268, 5272.

III.

Plaintiff contends that the sixth paragraph of § 474, and § 504, prohibit plaintiff and others from using illustrations of money as vehicles for the expression of opinions and ideas, except in accordance with narrow and arbitrarily defined criteria. It further contends that under the criteria set forth in these provisions the Government has the power, which it freely exercises, to determine if given material, i.e., illustrations or likenesses of U.S. currency, in a newspaper or magazine qualifies as news. It submits that in light of the adverse impact which these statutes have on the plaintiff's right of free speech and right freely and without restriction to publish and comment upon the news, they are unconstitutional on their face, and as applied to the activities of plaintiff.

More specifically, plaintiff contends that illustrations of money serve as powerful symbols in countless contexts in the

reporting of, and in commentary on, the news and in the free exchange of ideas; that absent some compelling governmental need the use of such symbolic illustrations may not constitutionally be curtailed; that even if some compelling governmental need were identified, the constraints upon the use of illustrations of money for symbolic purposes in public reporting and discourse must be narrowly crafted to serve that need with the minimal possible impact upon freedom of speech and of the press; and that no constitutionally cognizable compelling governmental need can be identified with respect to the challenged provisions.

The defendants contend that the sixth paragraph of § 474, and § 504, constitute reasonable exercises of the power of the government to prevent counterfeiting and to preserve and maintain the integrity of the currency system of the United States, and that they are constitutional facially and as applied to plaintiff. They assert that the restrictions imposed by the statutory scheme are directed not to the content of the articles which plaintiff seeks to illustrate, but to the manner or style in which money is illustrated, and that those restrictions are minimal. They maintain that the First Amendment does not guarantee to plaintiff the right to illustrate money as a symbol in precisely the manner plaintiff happens to consider most effective.

Defendants also challenge the existence of any case or controversy between plaintiff and defendants.

IV.

The material facts, summarized in this section, are not in dispute.

Illustrations of money are used by plaintiff as symbols. Within the past fifteen years, plaintiff's magazines have at various times utilized illustrations, photographic or otherwise, of United States currency to symbolize the toll of inflation, to represent the economic issues at stake in a presidential election, to comment upon political scandals, and to convey information

or commentary upon matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in amateur basketball. On many of these occasions some representative of the Treasury Department has warned plaintiff that specified illustrations violated Chapter 25 of Title 18.

The illustrations depict money in undersize or oversize, and they distort it. Since they appear on only one side of a printed page, the illustrations show at most only one side of any currency depicted.

1. The December 14, 1970 front cover of *Time* featured a photographic reproduction in color of approximately one-quarter of the face of a $1 federal reserve note, blown up five times and partially obscured by red printed legends. The illustration related to a story appearing in the magazine about inflation. About a month after publication, an agent of the Secret Service advised Time's production department that the illustration was illegal on the ground that federal law barred publication of any likeness of currency in color. He warned that Time must cease and desist from further violations.

2. An inside page of the July 29, 1974 issue of *Time* bore a photographic reproduction, in black and white, of approximately one-half of the face of a $1 bill, substantially obscured by an overlay of a life preserver. The illustration accompanied an essay on "How to Mobilize Against Inflation." About two months after publication, a Secret Service agent visited an attorney in Time's legal department and advised him that the illustration violated § 504, which barred any black-and-white illustration that was not less then three-quarters nor more than one and one-half times actual size. The agent warned that Time must cease and desist from further violations.

3. On the February 23, 1976 front cover of *Time* appeared a photographic reproduction in black and white of a $1000 bill, substantially obscured by an overlaid printed legend and by an overlaid graphic design. The illustration related to a story

within the magazine entitled "The Big Payoff," concerning allegations of international bribery by an American aircraft firm. In a letter dated February 24, 1976 the assistant legal counsel to the director of the Secret Service notified Time that in the opinion of the Department of the Treasury, the cover illustration violated § 504. The letter set forth that to qualify under § 504 the illustration must not only meet the size requirements but must "appear in articles, books, journals, newspapers, or albums for historical, educational, numismatic or newsworthy purposes." The letter further stated that "[t]he Department has taken the position that in order for an illustration to be permissible it must be accompanied by information about the particualr [sic] item reproduced and cannot be used for decorative or eye-catching purposes." On February 25, 1976 Secret Service agents visited Time's legal department to warn that Time must cease and desist from further violations.

4. The November 1, 1976 front cover of *Time* carried a photographic reproduction in color of $1, $10, and $20 bills clutched in a human hand. The bills were folded lengthwise, and photographically reduced to less than one-half actual size. With repect to most of the photographed bills, only a part of an outside border, or the border and a fragment of a single numeral, was visible. The legend, "Voting Your Pocketbook," was splashed across the bottom of the cover. The illustration bore upon the impending Presidential election and the impact of inflation on voting trends, which was the subject of a story within the magazine. The assistant legal counsel to the Secret Service notified Time's legal department by letter dated November 18, 1976 that the color illustration violated § 474. The letter reviewed previous warnings which had been given to plaintiff, including those with respect to the July 29, 1974 and February 23, 1976 issues of *Time*, and advised plaintiff "to cease and desist from the use of any future reproductions of currency appearing in color. . ." The letter warned: "If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action."

5. *Fortune's* February 12, 1979 front cover photographically reproduced, in color, federal reserve notes enclosed within a money clip. The notes were folded twice widthwise, and enlarged to more than twice their actual size. Only fragments of the outside borders of most of the notes were visible. Approximately one-third of the reverse side of the top $1,000 note was visible, substantially obscured by the overlaid money clip. The illustration pertained to a story about "America's Invisible Rich" appearing within the magazine. About nine months after publication, a Secret Service agent telephoned Time's legal department to inform it that the illustration violated §§474 and 504, which barred any color likeness, and that he had been instructed to give Time a " 'slap on the wrist.' "

6. The February 16, 1981 front cover of *Sports Illustrated* sported a photographic reproduction in color of $100 federal reserve notes pouring into and stuffed inside a basketball hoop and attached net. The notes were reduced to approximately one-third actual size, and each was visible only in part; most were substantially obscured by overlaid portions of other notes, by the basketball hoop or net, or by an overlaid printed caption, "Anatomy of a Scandal." The illustration related to a story in the magazine about a "point-shaving" scheme in amateur basketball. On May 18, 1981 a Secret Service agent informed Time's legal department that the illustration violated § 474 and that it would be necessary for the Service to seize all plates and materials used in connection with the production of that cover. The agent requested the names and addresses of all the printers who prepared the cover and further requested an "interview" with a member of Time's management, with counsel present if so desired. The agent stated that the statutory prohibition against publication of currency illustrations aimed to forestall the possibility that a printer involved in the process of creating the illustrations might conclude that it was easy to copy currency, and thus be inspired to do so for profit.

On occasion the Secret Service advised plaintiff to alter illustrations it intended to use.

1. The September 10, 1965 front cover of *Time* ultimately carried a painted portrait of Secretary of the Treasury Henry Fowler with an artist's black-and-white rendering of a $10 bill. Time had originally planned to use a color painting of a furled $10 federal reserve note on which the portrait of Alexander Hamilton, the legend, "United States of America," and the arabic numeral "10" would have been visible. However, when Time sought the views of the Secret Service as to the lawfulness of the background painting, it was advised that it was illegal, and the illustration was changed.

2. The July, 1977 issue of *Fortune* displayed a photographic reproduction of several rows of United States coins receding into the background, where three open doors stood in the dark sky. *Fortune's* editors had originally intended to use three $100 bills as a landscape set beneath the three open doors. Each of the bills was significantly enlarged, shown only in part, and distorted in color, shape, and size. When the legal department of Time sought the views of the Secret Service, it was told that the intended illustration was illegal.

To the editors of plaintiff's magazines the use of illustrations of money as symbols is important in reporting news, in analyzing for their readers complex financial and economic concepts, and in facilitating commentary on national and world affairs.

V.

The sixth paragraph of § 474 certainly reaches all and any likenesses of United States currency. By its terms it prohibits the printing of any "engraving, photograph, print, or impression" in the likeness of any portion of any specimen of United States currency. Thus it does not matter whether the likeness is good or bad, true to size or distorted, faithful to the true color or discolored, printed on paper similar to currency or impressed

on waxpaper. Any likeness of any part of United States currency, whether or not capable of deceiving anyone, or whether or not intended to express an abstract idea, is banned by the language of the provision. The print of a drawing of the corner of a ten dollar bill is prohibited. A button showing the pyramid on the back of a one dollar bill is prohibited. A 3-foot by 2-foot blow-up of a twenty dollar bill with substituted numbers and language is prohibited.[8] A painting of the back of a one thousand dollar bill covering the wall of a barn is prohibited. A print of a fingernail charcoal sketch of the name of the United States of America as it appears on a twenty dollar bill is prohibited. An engraving of the legend, "In God We Trust," found on the back of a ten dollar bill, is prohibited. A plastic impression of a dollar bill is prohibited.

The sixth paragraph of § 474 does not by its terms require intent to defraud, to deceive, to counterfeit. One violates the law simply by creating, executing, selling or bringing into the United States any kind of likeness of United States currency or any part thereof, whether or not the likeness is such that it might assist a counterfeiter in the reproduction of fraudulent notes or deceive a person into accepting such notes as legal tender for a debt.

Section 504 provides exemptions from the total ban imposed by the sixth paragraph of § 474. It permits the printing or publishing of "illustrations" of United States currency which meet *all* of the following requirements: (a) they must be in black and white; (b) they must be "of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated"; (c) they must appear "in articles, books, journals, newspapers, or albums"; and (d) they must be for ". . . philatelic, numismatic, educational, historical, or newsworthy purposes." The word "illustration" does not appear in § 474. Neither § 504 nor any other provision of applicable law contains any definition of "illustra-

[8] *See Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *affirmed*, 534 F.2d 833 (8th Cir. 1976).

tion" or of "philatelic, numismatic, educational, historical, or newsworthy purposes."

The Treasury Department, which through the Secret Service is primarily responsible for the enforcement of the counterfeiting laws, requires in addition that an illustration otherwise permitted by § 504 "be accompanied by numismatic, educational historical or newsworthy information relating directly to the item that is illustrated."[9] The Treasury Department has also taken the position that § 504 does not exempt illustrations which are "used primarily for decorative or eye-catching purposes."

VI.

"[C]oncrete legal issues, presented in actual cases, not abstractions" are an absolute requisite for adjudication of legal disputes. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940). *See also Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 443 (1938).

Although 28 U.S.C. § 2201 authorizes the court to declare the rights of the parties before it, the statute permits no relief which is not "consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient

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[9] Paragraph 14 of defendants' amended answer reads in part as follows:

> . . . Defendants admit that in the opinion of the Department of the Treasury section 504 prohibits illustrations used primarily for decorative or eye-catching purposes and also requires that an illustration permitted by the section be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated.

immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Thus the initial inquiry is whether there exists a justiciable controversy sufficient to support the jurisdiction of a federal court. U.S. Const. art. III, §2.[10]

The Government asserts an absence of justiciability because plaintiff has not been arrested and prosecuted under the statutes. The gist of its argument is that a finding of justiciability may not be predicated upon a pattern of warnings: only an actual prosecution creates an Article III controversy.

This is not the law. "[I]t is not necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974). Justiciability exists where plaintiff's "challenge is to those specific provisions of [federal] law which have provided the basis for threats of criminal prosecution . . ." *Id.* "[Plaintiff] should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).[11]

Plaintiff as a magazine publisher claims First Amendment protection for its use of illustrations of currency for symbolic purposes in connection with articles it has published and

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[10] Article III, § 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies to which the United States shall be a Party; . . .

[11] In *Doe* v. *Bolton*, the Court held that where physicians licensed by the state who are consulted by pregnant women attack the constitutionality of a "recent and not moribund" state abortion statute which is the successor to another abortion statute under which physicians were prosecuted, they have standing to challenge the statute and a justiciable controversy is presented. 410 U.S. at 188-189.

intends to publish in the future in its various magazines. The provisions of the sixth paragraph of § 474, and of § 504, read together, proscribe the creation or publication of such illustrations: by the very terms of those provisions the creation of illustrations such as those already published by plaintiff constitutes a federal offense, regardless of intent or malice. Defendants certainly regard illustrations of United States currency already used by plaintiff as contravening the statutory prohibitions, and have repeatedly warned plaintiff of its criminal transgressions. Plaintiff has been told that if it does not cease and desist "from the use of any future reproductions of currency appearing in color," the matter will be turned over to the United States Attorney for "appropriate action."[12] There have

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[12] Letter to associate counsel of plaintiff from assistant legal counsel of the Secret Service, dated November 18, 1976:

> We are again advising Time, Incorporated to cease and desist from the use of any future reproductions of currency appearing in color or for advertising purposes. If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action.

This element of threatened prosecution is what distinguishes this case from *Poe* v. *Ullman*, 367 U.S. 497 (1961). In *Poe* v. *Ullman*, Connecticut statutes enacted in 1879 prohibited the use of contraceptive devices and the dispensation of medical advice concerning that use. There had been only one prosecution thereunder, a test case in 1940 to determine constitutionality. Plaintiffs in *Poe* sued for declaratory judgments, challenging the statutes on Fourteenth Amendment grounds. The Court found no justiciable controversy because there was no threat of prosecution:

> "The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . ."

367 U.S. at 504-505, quoting from *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). There was no allegation, explicit or implicit, that appellee Ullman threatened to prosecute plaintiffs under the statutes. 367 U.S. at 501.

This case is in a different factual posture than *Poe* v. *Ullman*. There have been many warnings emanating from the Treasury Department over the years, which are discussed in the text at pp. 10-16, *supra*. There have also been various criminal prosecutions under § 474, *see* fn. 13, *infra*.

been relatively recent court cases involving violations of the sixth paragraph of § 474, although only one of them entailed a constitutional challenge analogous to that proffered by plaintiff in this case.[13]

The absence to date of prosecutorial action with respect to plaintiff does not diminish or lessen the immediacy and ripeness of this controversy: "[c]ontingency of official enforcement of clearly applicable criminal prohibitions should not be grounds for denying present review, even if there is no demonstrated threat of prosecution." 13 *Wright, Miller & Cooper, Federal Practice and Procedure:* Jurisdiction § 3532 at 247 (1975). The warnings emanating from the Treasury Department have been

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[13] *Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976). *See* discussion, *infra*, on pp. 36-37.

In *Wholesale Vendors of Texas, Inc.* v. *United States*, 361 F.Supp. 1045 (N.D. Tex.), *aff'd mem.*, 486 F.2d 1402 (5th Cir. 1973), a manufacturer of novelty items sold through vending machines sought a judgment declaring, *inter alia*, its right to manufacture "play money" seized from its premises by agents of the Secret Service. The district court denied the request, stating its unwillingness "to hold that the Treasury and Secret Service agents were without authority to seize and retain the [likenesses] in question." 361 F.Supp. at 1048. The plaintiff had received conflicting information from various officers of the Department of Treasury. No First Amendment interest was asserted and no constitutional question was decided.

In *Koran* v. *United States*, 408 F.2d 1321 (5th Cir. 1969), *cert. denied*, 402 U.S. 948 (1971), defendant was convicted for the unlawful possession of a one-dollar silver certificate under the fifth paragraph and for unlawful printing of the certificate under the sixth paragraph of § 474. Defendant had discussed plans to print a large quantity of counterfeit currency with a government informer which led to his investigation and arrest by the Secret Service. The case involved a Fourth Amendment claim; no First Amendment interest was asserted nor did the Court of Appeals mention that issue.

In *Webb* v. *United States*, 216 F.2d 151 (6th Cir. 1954), the Court of Appeals affirmed the conviction under the sixth paragraph of § 474 of two people engaged in a confidence game which included an effort to defraud the victim through the use of crudely counterfeited money. The likenesses were executed with the intent to commit a crime. The constitutionality of § 474 was not mentioned, and no First Amendment claim was asserted.

over a period of at least ten years. The United States Attorney has never disavowed the possibility of prosecution.[14] Despite the lack of a federal indictment, "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co., supra,* 312 U.S. at 273. The matter before me is ripe for Article III adjudication.

VII.

As a threshold matter, I consider 1) whether plaintiff's use of illustrations of money in various contexts constitutes in its content speech which is protected by the First Amendment,[15] and 2) the nature of the statutory provisions which are challenged.

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[14] It is instructive to note the posture of plaintiffs in *United States Postal Service* v. *Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981). The civic associations there filed suit for declaratory and injunctive relief upon receiving advice from the Postmaster in White Plains, New York, that continuation of their practice of using letter boxes for the delivery of unstamped notices could result in a fine up to $300. There is no indication that any member of the civic organizations had any contact with the Justice Department or any other law enforcement agency respecting their alleged violations of the postal statute. While a court may, *sua sponte,* raise the question of subject matter jurisdiction, neither the district judge, nor the Court of Appeals, nor any of the five justices of the United States Supreme Court who wrote opinions in the case voiced any question as to the justiciability of the matter.

[15] When a court is asked to determine whether a species of speech is covered by the First Amendment, it must look to the content of the expression. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U.S. 15, 23 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-572 (1942) (fighting words).

1. Plaintiff's illustrations of money as protected speech.

The illustrations reviewed in the earlier portion of this opinion make it clear that plaintiff used illustrations of money symbolically—to dramatize or illustrate a set of facts, an existing condition, a moral crisis, a course of conduct. "A picture," it has been said, "is worth a thousand words." Certainly the use by plaintiff of illustrations of money in connection with its various magazine articles gave emphasis, thrust, and even poignancy to the messages of the articles to which the illustrations pertained. A dollar bill worth seventy-three cents, with George Washington shedding a tear, constituted graphic editorial commentary on the ravages of inflation; a hoop and net stuffed to overflowing with hundred dollar bills was a powerful statement of the impact of gambling on the sport of basketball. The image of money is a powerful, expressive symbol, of significant value to members of the press, including plaintiff, in communicating information and ideas on a wide range of issues of vital public interest.[16] It is, to state the obvious, a particularly effective symbol for the communication of ideas about money itself. The economy, inflation, money supply, foreign trade imbalances, interest rates, and national deficit have all been part of the stuff of analytical and interpretive news reporting in recent years—reporting which has driven home to the individual citizen the impact of these matters on his or her daily life. To the extent that illustrations of money as symbols, used in connection with newspaper and magazine reporting on such matters, have explicated or made more comprehensible the very complicated concepts being treated, to that extent the public has been well served.

Since the use of the symbol of money by plaintiff has been, and will continue to be, intimately related to the expression and communication of ideas, I find that the publication or printing of illustrations of United States currency by plaintiff is protected

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[16] "Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981).

speech under The First Amendment. It does not entail expression which is deemed by the nature of its content to be subject to regulation in the interests of the public weal. Publishing illustrations of currency does not involve speech characterized by the Supreme Court as posing a "clear and present danger," *Schenck* v. *United States*, 249 U.S. 47 (1919), as "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), as "defamation," *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), as "obscenity," *Miller* v. *California*, 413 U.S. 15 (1973), as "libel," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), or as "commercial speech," *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Thus absent constitutionally permissible overriding considerations, plaintiff has a First Amendment right to publish or print illustrations of United States currency.

2. The nature of the challenged statutory provisions.

The sixth paragraph of § 474 prescribes a comprehensive ban on all likenesses of United States currency. It is triggered by the unauthorized presence of an illustration of money, as symbol or otherwise, and it purports totally to remove that illustration from the national discourse. It is a subject matter regulation.

Section 504 is a content-based measure which would allow certain illustrations of money ("black and white" and "less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated") to appear in certain forums ("articles, books, journals, newspapers, or albums"), provided that they were created for a particular purpose ("philatelic, numismatic, educational, historical, or newsworthy"). The statute necessarily vests officers of the executive branch with power to determine the content and purpose of the illustrations. No guiding definitions are set out as to what constitutes an illustration or a philatelic, numismatic, educational, historical, or newsworthy purpose.

In summary, the sixth paragraph of § 474 targets one particular set of illustrations (illustrations of money) for proscription while § 504 is a line-drawing regulation involving the discretion of government officials with respect to content, purpose, and location in determining the availability of exemptions from that proscription.

VIII.

The determination of the nature of plaintiff's speech and of the challenged statutes aids in ascertaining the applicable legal principles developed over the years in First Amendment law.[17] If speech is protected by the First Amendment, a statute which impinges upon that speech must be narrowly drawn so as to be an efficacious means of achieving permissible objectives of the government. *See*, e.g., *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). The statute must be narrowly aimed at the permissible objectives and it must to the extent possible avoid impinging on protected speech. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972).

"Although [the government] may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider* v. *State*, 308 U.S. 147, 160 (1939). Regulations addressed to legitimate governmental goals cannot "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964). This is the "overbreadth doctrine": a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within

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[17] *See* A. Cox, *Freedom of Expression* (1981) at 6: "Classification is important . . . because the earlier efforts to bring all first amendment cases under a 'clear and present danger' test have rightly given way to a variety of standards keyed to the character of the restriction."

its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

Where a statute impinges upon protected speech, the burden is on the government to establish the validity of its asserted interests. *Schneider* v. *State, supra*, 308 U.S. at 161. The judiciary has an overriding obligation "to assess the substantiality of the justification[s] offered," *Schad* v. *Borough of Mt. Ephraim*, 452, U.S. 61, 69 (1981), and to ensure that the regulation promotes legitimate governmental ends with minimal intrusion on First Amendment freedoms. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes* v. *Oradell*, 425 U.S. 610 (1976). "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker, supra*, 364 U.S. at 488. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967).

Where the government regulation is aimed at the noncommunicative impact of protected speech and at harm not caused by the ideas or information contained in that speech, the regulation may be upheld so long as it does not *unduly* constrict the flow of information. *See Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) [upholding ordinance requiring parade permits where official discretion was limited exclusively to considerations of time, place, and manner: "[T]he question in a particular case is whether [a] control is exerted so as not to *deny* or *unwarrantedly* abridge the right of assembly and the opportunities for the communication of thought . . ." *Id.* (emphasis added)].

Justice Powell's opinion for the Court in *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980), sets forth an instructive framework for analysis of the constitutionality of statutes that bear to some degree on speech. In *Consolidated Edison*, the Court struck down an order by the

New York Public Service Commission that prohibited public utilities from including, with monthly bill mailings, inserts which discussed controversial issues of public policy. The order, according to the Court, directly infringed upon freedom of speech protected by the First and Fourteenth Amendments.

Justice Powell's opinion, noting that a restriction which impinges upon speech is not *per se* invalid, emphasizes that the burden to show the constitutionality of such a restriction is on the state. The opinion suggests analysis in terms of whether the restriction is a reasonable time, place or manner restriction, or whether it is a permissible subject matter regulation, or whether it is narrowly crafted to serve a compelling state interest:

> The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. (Citation omitted) We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

Consolidated Edison v. *Public Service Commission, supra,* 447 U.S. at 535.

I turn to such analysis of the challenged provisions.

IX.

Sections 474 and 504 are interrelated in that § 474 imposes a complete bar to the use of illustrations of money, whereas § 504 exempts from that bar illustrations which satisfy certain criteria as to size (less than three-fourths or more than one and one-half the size of currency), color (must be rendered in black and white), forum (must appear in articles, books, journals, newspapers or albums), and purpose (must be for "philatelic, numismatic, educational, historical, or newsworthy" purpose). Section 504 broadly exempts from § 474, without applying the

above criteria, pictures of currency to be used for non-advertising purposes in motion pictures or television.

Because of the interrelationship of Sections 474 and 504, the ultimate constitutional analysis must be directed to the impact of these sections in tandem upon plaintiff's activities—the extent, if any, to which they prevent or deter constitutionally protected activities. Where it is alleged, as plaintiff alleges here, that threatened enforcement of provisions of law infringe upon a protected liberty, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad* v. *Borough of Mt. Ephraim, supra,* 452 U.S. at 68, citing to *Thomas* v. *Collins,* 323 U.S. 516, 529-530 (1945).

Preliminary analysis of § 474 and § 504 separately will be useful in ultimate determination of their combined impact upon plaintiff's First Amendment rights.

1. Section 474

The sixth paragraph of § 474 does not enunciate a time, place or manner restriction. Time, place, and manner restrictions are geared toward *methods* of speech and seek to accommodate a particular way of expression with the safety or health interests of the community. "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison* v. *Public Service Commission, supra,* 447 U.S. at 536. *See also Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85 (1977) (for sale signs); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra* (pharmaceutical advertisements); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949) (sound trucks); *Cox* v. *New Hampshire, supra* (parade permits).[10]

[10] Even if the provision could be construed as a time, place or manner restriction, its concern with the subject matter of speech, i.e., the symbol of money, would violate the traditional rule that to be constitutional, time, place or manner restrictions must be applied to all

As noted in Section VII, *supra*, in proscribing the use of illustrations of money, as symbols or otherwise, the sixth paragraph of § 474 constitutes subject-matter regulation. Subject-matter regulations encounter great difficulty passing constitutional muster in our jurisprudence, and regulations based on subject matter of speech have been approved only in narrow circumstances. Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972); *see Cox* v. *Louisiana*, 379 U.S. 536, 580-581 (1965) (opinion of Black, J.). "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 538.

In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Supreme Court held that the United States Government could prohibit partisan political speech on a military base even though civilian speakers had been permitted to lecture on other subjects. The exclusion was justified by the historical tradition "of keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind." *Id.* at 839. Thus the decision interpreted the public's right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.* at 842. (Powell, J., concurring).

In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (opinion of Blackmun, J.), a plurality similarly concluded that a city transit system that rented space in its buses for commercial advertisements was not under a duty to provide space for partisan political commercials. The Court gave weight to the city's fear that partisan political ads might jeopardize long-

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speech irrespective of content. *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 536; *Carey* v. *Brown*, 447 U.S. 455, 470 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975).

term commercial revenue and lead to accusations of favoritism. *Id.* at 304.

Both *Greer* and *Lehman* concerned the relationship of political speech to a particular governmental facility: the Court concluded that partisan political speech posed a danger to the operation of these facilities.

The flat ban on the journalistic or public use of the symbol of money cannot be equated with the *Greer* and *Lehman* cases. This case does not concern the availability of a public facility for the exercise of the free speech right by private parties. Time does not seek to use the United States Courthouse in Foley Square as a facility from which to propound its views. The sixth paragraph of § 474 cannot be upheld by reliance upon those cases that rest on the special interests of a government in operating its own property.

The sixth paragraph of § 474 does impinge on plaintiff's freedom of speech, since plaintiff has a protected right to use illustrations of money as symbols in connection with its articles (*See* Section VII, *supra*), and § 474 prohibits such use. Thus the question, as posed by Justice Powell in *Consolidated Edison*, is whether that prohibition is "a narrowly tailored means of serving a compelling state interest." 447 U.S. at 535. This court has an overriding obligation "to assess the substantiality of the justification[s] offered" and to ensure that the regulation promotes legitimate governmental ends with the minimal intrusion of First Amendment freedoms. *Village of Schaumburg* v. *Citizens for a Better Environment, supra*, 444 U.S. at 636; *Schad* v. *Borough of Mt. Ephraim, supra*, 452 U.S. at 69.

The justifications offered by defendants for the prohibitions contained in the sixth paragraph of § 474 are basically twofold. The first justification is that the prohibitions prevent counterfeiting. The second justification is that the prohibitions protect "the value [of] and respect for instruments issued as the official obligations and securities of the United States."

The government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's

currency system. Is the sixth paragraph of § 474, however, a narrowly tailored means of preventing counterfeiting of United States currency? It casts its net over any and all likenesses of such currency whether or not any given likeness has the capacity to deceive or to act as a vehicle for counterfeiting. Thus it is overbroad. *Thornhill* v. *Alabama, supra,* 310 U.S. at 97. Where protected speech, namely the publication of illustrations of United States currency, is involved, the law must be drawn with "narrow specificity" so as to avoid any unnecessary infringement on that speech. *NAACP* v. *Button, supra,* 371 U.S. at 433.

That requirement is not satisfied by § 474's proscription of *all* likenesses. Neither the illustrations of money used by plaintiff nor the plates used to print those illustrations can be used to counterfeit money, or as counterfeit money.[19] To criminalize illustrations such as those employed by plaintiff that have no utility for fraud or forgery and that cannot be used for counterfeiting, but which do serve as vehicles for artistic or journalistic expression, violates the First Amendment by interfering unduly with protected speech. There are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse.

Defendants' second justification for the § 474 prohibitions—that they protect the value of and respect for the official obligations of the United States—is quite simply a constitutionally impermissible one. When this justification is analyzed, it can only mean that § 474 bans the use of illustra-

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[19] Plaintiff claims, and defendant denies, that the illustrations cannot be used for counterfeiting or as counterfeit currency. Plaintiff has submitted affidavits to the effect that "the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency can be of little value to someone attempting to counterfeit a hand-engraved, two-sided dollar bill." (*See* Affidavit of Henry A. Grunwald). Common sense does not permit a contrary conclusion. Defendants do not seriously contend otherwise. Plaintiff has no objection to that part of the statute which requires that materials used to print representations of money be destroyed after their final use.

tions of money because of the ideas such illustrations may symbolically represent. This runs counter to the constitutional doctrine that the government may neither prohibit nor prescribe the form or content of individual expression, absent a compelling state interest. *Police Department of the City of Chicago* v. *Mosley, supra*, 408 U.S. at 95, 98. The government cannot compel or prohibit respect for any symbol or idea in this country. *Stromberg* v. *California*, 283 U.S. 359 (1931) (state prohibition of display of red flag struck down); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (mandatory salute of the American flag invalidated); *Street* v. *New York*, 394 U.S. 576 (1969) (conviction for "disrespectful" language about the flag set aside); *Schacht* v. *United States*, 398 U.S. 58 (1970) (punishment for theatrical use of a uniform which was critical of the Army invalidated). Neither plaintiff nor any citizen can be compelled by the government to pay respect to the dollar. The sixth paragraph of § 474 cannot be justified as protecting, by restraining speech, "the value [of] and respect for" currency issued by the government.[20]

In *Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976), plaintiff sought a declaratory judgment that the sixth paragraph of § 474 had been unconstitutionally applied to a 36″ x 15″ reproduction he had made in the likeness of a twenty dollar federal reserve note with substantial modifications. These modifications included, *inter alia*, changing the picture of President Jackson to President Nixon, replacing the words "Federal Reserve Note" with the words "Inflationary Note," substituting "Thirty" for "Twenty", and drawing a teapot in place of the Federal Reserve seal. The finished product was intended as a political statement critical of President Nixon's economic policies and his involvement in the "Watergate" affair.

The district court held that the poster fell within the specific proscriptions of the sixth paragraph of § 474 and that

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[20] This second justification so clearly presents an impermissible state interest that it is not necessary to determine, with respect to it, whether a less intrusive approach would be possible.

the provision was not overbroad. The sixth paragraph of § 474 was, the court held, "aimed only at the suppression of the non-communicative conduct within its scope," and was "an appropriately narrow means of protecting a substantial governmental interest" which did "not necessarily interfere with First Amendment rights." 412 F.Supp. at 432.

Wagner arose in a factual context that distinguishes it from the instant case. First, the plaintiff in *Wagner* wanted to sell his product, a commercial aspect not present here, although Time is in the publishing business for a profit. Second, *Wagner* involved an individual artist; this case involves a plaintiff which is a member of the press and which makes the argument that illustrations of currency are vitally necessary to the dissemination of news. No such argument was asserted in *Wagner*. As Justice Holmes once observed, "[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." *Quong Wing* v. *Kirkendall*, 223 U.S. 59, 64 (1912).

In any event, the *Wagner* district court did not engage in the analytical process now called for by *Consolidated Edison, Schad, Grayned* and other free speech/free press cases.[21] It did not examine the statute, assess its justifications, nor probe its nexus to the governmental interest purported to be served by it. It did not even indicate whether Wagner's work had any First Amendment protection. I decline to follow it.

2. Section 504

Although the prohibitions in § 474 do not withstand constitutional scrutiny, it is necessary to examine § 504, since if its provisions permitted what § 474 prohibits, a constitutional confrontation would be avoided.

Insofar as plaintiff's illustrations are concerned, Section 504 leaves in place the § 474 proscriptions, and in the course of various of the warnings with respect to plaintiff's violations of

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[21] Of these cases, only *Grayned* had been decided at the time of the *Wagner* decision.

law, government representatives have invoked § 504 (*see* pp. 10-16, *supra*). Be that as it may, § 504 presents troublesome constitutional problems of its own.

Section 504 allows black and white illustrations of United States currency less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter illustrated, appearing in articles, books, journals, newspapers or albums for philatelic, numismatic, educational, historical or newsworthy purposes. This § 504 draws lines: it is a time, place and manner regulation that creates distinctions among illustrations of currency based on criteria pertaining to content, purpose, and forum in which the illustration appears. Section 504 must meet the constitutional standard for time, place or manner regulations: it is to be applied to all speech irrespective of content. *Consolidated Edison* v. *Public Service Commission, supra,* 447 U.S. at 536; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

Section 504's concern with "philatelic, numismatic, educational, historical, or newsworthy" purposes is constitutionally impermissible. Governmental action that regulates speech on the basis of its subject matter " 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Police Department of the City of Chicago* v. *Mosley, supra,* 408 U.S. at 99, quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 29. In enforcing § 504, the government decides whether the purpose of the illustration is "philatelic, numismatic, educational, historical or newsworthy" and whether the forum in which it appears is indeed an article, a book, a journal, a newspaper or an album. Such decisions are based on content or subject matter. Succinctly put, § 504 requires judgments about the nature and quality of the message contained in the illustration, about the nature and quality of the article to which the illustration relates, and about the nature of the forum containing the illustration, types of judgment the First Amendment prohibits the government from making. *Cohen* v. *California,* 403 U.S. 15, 24 (1971); *Thornhill* v. *Alabama, supra.*

In *Village of Schaumburg* v. *Citizens for a Better Environment, supra,* a municipal ordinance required charitable organizations which desired to raise money in house-to-house solicitation to demonstrate that at least 75% of the receipts would go to charitable purposes. 444 U.S. at 624. Plaintiff, a charitable organization, sued to invalidate the ordinance on the ground that it was overbroad because it barred advocacy-oriented causes whose receipts of contributions were used for salaries and organizational costs, not charitable purposes.

The United States Supreme Court agreed with plaintiff's contention that the statute bore little relation to its goal of preventing fraud or crime and constituted too great an intrusion on plaintiff's free speech right. 444 U.S. at 636. The 75% requirement was perceived to bear heavily on freedom of speech and could only be countenanced if it enjoyed a significant relationship to substantial governmental interests. *Id.* Finding these interests substantial, the Court nonetheless found that they were only peripherally served by the ordinance and could be served by a more narrowly drawn law. *Id.*

Village of Schaumburg demands a tight nexus between the requirements of a statute and the promotion of the governmental goals, especially where a constitutional right is implicated. *Id.* at 639. Such a nexus is missing here. There is no relationship between the distinctions among the purposes and forums, and the evils that the statute purportedly targets. Will an illustration in a numismatic journal be any less susceptible to forgery than one appearing in *Playboy?* Will a newsworthy illustration of money in a book be any less susceptible to forgery than a non-newsworthy item? Indeed, the newsworthiness of an illustration has no bearing on its capacity (or lack thereof) to deceive a person or to facilitate a criminal's attempt at forgery. Neither the purpose to which an illustration is put nor the forum in which it appears has any relation to the prevention of counterfeiting. The federal statutory scheme evidenced in § 504 is insufficiently related to the governmental interests it seeks to promote to justify intrusion on protected speech.

Just as an organization which spends more than 25% of its receipts for non-charitable purposes is no more likely to commit fraud or crime than an organization spending less than 25% of its receipts for non-charitable purposes, the illustrations banned by the provisions under challenge here are no more likely to threaten the public welfare than those arbitrarily allowed. As a charity's ability to fulfill the 75% requirement bears no relationship to the likelihood of its solicitors to commit fraud or crime, the newsworthiness or educational value of an illustration, or the forum in which it appears, has little to do with its capacity to defraud the public.

As an exception to the absolute prohibitions of § 474, the lines drawn by § 504 do not directly promote the government's interest in preventing counterfeiting through the least restrictive means, and they intrude unnecessarily upon plaintiff's freedom of speech. *Shelton* v. *Tucker, supra,* 364 U.S. at 488.[22]

Hynes v. *Oradell, supra,* teaches that a law which fails to inform the public how to conform, and which fails to provide narrow, specific standards for those officials who must apply it, is void for vagueness. 425 U.S. at 622. Thus there is also a problem of vagueness with § 504. The determination of what is "philatelic, numismatic, educational, historical, or newsworthy" is rife with assumption and open to varying interpretation. The definition of a journal, newspaper or album is anyone's game to play. It has been long recognized that time, place, and manner regulations which vest in law enforcement authorities the capacity for discretionary enforcement or subjective definition

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[22] Section 504 also suffers from both under-inclusiveness and over-inclusiveness. It is under-inclusive in that it exempts the broadcast media. It is over-inclusive in that its prohibition bans the finished product irrespective of its ability to perpetrate fraud or crime as well as the plates and the negatives, more likely raw materials for counterfeiting currency. This under- and over-inclusivity indicates a failure to be "a narrowly tailored means of serving a compelling state interest." *Consolidated Edison* v. *Public Service Commission, supra,* 447 U.S. at 535.

of an offense are instruments for censorship.[23] *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *Heffron* v. *ISKCON*, 452 U.S. 640 (1981).

The distinctions drawn by § 504 do not clearly delineate the area of forbidden conduct, which forces the public to guess at its essential meaning in violation of due process of law. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Hynes* v. *Mayor of Oradell*, *supra*, 425 U.S. at 620. This operates to produce a chilling effect on speech, a vice condemned by the First Amendment. *Smith* v. *California*, 361 U.S. 147 (1959); *Gooding* v. *Wilson*, *supra*.

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[23] The vice of vagueness is starkly illustrated by the two additional requirements which have been communicated to plaintiff by agents of the Treasury Department. *See* fn. 9, *supra*.

Not only must an illustration meet each and every one of the criteria set out in Section 504: it must also "be accompanied by numismatic, educational, historical, or newsworthy information relating directly to the item that is illustrated." This requirement shrinks Section 504's exceptions from Section 474's prohibitions to the vanishing point: even if an illustration were to meet all of Section 504's criteria, it would still be illegal if it did not relate to the specific piece of currency so illustrated. Not only does that additional requirement have no bearing on the asserted goal of preventing forgery but it also represents a Governmental attempt to dictate the contents of a message, implicating immediate and close constitutional scrutiny. *See Shelton* v. *Tucker*, *supra*.

The second requirement put forth by Treasury insists that "decorative or eye-catching" illustrations are not allowed. A front cover illustration that meets all § 504 criteria but is eye-catching would be banned. The questions to ask are: what is "eye catching"? Who determines that issue? What does "eye-catching" have to do with the prevention of forgery?

Section 504 by its terms does not require that illustrations be accompanied by information relating to the item illustrated, nor does it require that the illustration not be eye-catching. The Treasury Department's position, thus, highlights the variance to which interpretation of the law is subject. The absurdity is compounded by the fact that there are very few currency notes in or out of circulation that would provide the basis for a news story.

X.

The original version of the sixth paragraph of § 474 was drafted in 1864 as a financial measure to assure the availability of funds for the War Between the States. In the meantime, technology has come a long way and this case represents a clash between an old law and the needs of modern society. Nowadays, if someone is going to counterfeit money, he or she has far more efficient and direct ways of doing the job than relying on Time's illustrations, all of which are distorted.

There is no material issue of fact. I find that the sixth paragraph of 18 U.S.C. § 474, and 18 U.S.C. § 504, are unconstitutional on their face and as applied to plaintiff. Plaintiff is entitled to judgment as a matter of law on its motion for summary judgment. Defendant's cross-motion for summary judgment is denied. A declaratory judgment to that effect shall be entered.[24]

Submit judgment.

/s/ VINCENT L. BRODERICK

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
June 4, 1982

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[24] Since a declaratory judgment is to be entered, and defendants will be bound by that judgment, I see no reason to enjoin defendants. *Poe* v. *Gerstein*, 417 U.S. 281 (1974); *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-485 (1965).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,

Plaintiff,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York,

Defendants.

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81 Civ. 3218 (VLB)

ORDER AND JUDGMENT

(Filed June 18, 1982)

Plaintiff Time Incorporated having commenced an action for (1) a judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* declaring that Tit. 18, U.S.C. § 474 ¶ 6 (1976) and Tit. 18, U.S.C. § 504 (1976) are unconstitutional and null and void on their face and as applied to plaintiff in that they are overbroad,

impermissibly infringe constitutionally secured freedoms of speech and of the press, are impermissibly vague, and impermissibly distinguish lawful from unlawful speech on grounds prohibited by the First and Fourteenth Amendments of the United States Constitution, and for (2) a permanent injunction pursuant to Fed. R. Civ. P. 65 restraining and enjoining defendants, their agents, and all persons subject to their direction and control from enforcing or threatening to enforce said statutes; and plaintiff and defendants having cross-moved this Court for summary judgment pursuant to Fed. R. Civ. P. 56, and after due deliberation thereon and upon the opinion of this Court dated June 4, 1982, it is

ORDERED that plaintiff is entitled to judgment as a matter of law and plaintiff's motion for summary judgment is granted, and defendants' motion for summary judgment is denied, and it is further

ORDERED, ADJUDGED AND DECREED that the sixth paragraph of 18 U.S.C. § 474 (1976), and 18 U.S.C. § 504 (1976), are unconstitutional on their face and as applied to plaintiff, Time Incorporated, Time & Life Building, Rockefeller Center, New York, N. Y. 10020, and it is further

ORDERED that plaintiff shall recover costs and disbursements from defendants in an amount to be taxed by the Clerk of this Court.

Dated: New York, N. Y.,
June 16, 1982.

/s/ VINCENT L. BRODERICK
U.S.D.J.

SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.*,

Appellants.

v.

TIME INCORPORATED.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

February 22, 1983

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Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-729

IN THE

Supreme Court of the United States

October Term, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,

Appellants,

v.

TIME INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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January 10, 1983

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 474 ¶ 6, a criminal statute which prohibits all expression through the use of photographs or artwork in the likeness of any portion of any specimen of United States currency, violates the First Amendment of the United States Constitution.

2. Whether 18 U.S.C. § 504, which exempts from the prohibition of § 474 ¶ 6 the publication of certain types of black and white illustrations of currency on the condition, *inter alia*, that such illustrations serve "numismatic, educational, historical or newsworthy purposes," violates the First Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

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APPENDICES

Appendix A

Title 18, U.S.C. § 474 ¶ 6 and § 504

Appendix B

Cover illustration, TIME Magazine, December 14, 1970.

Page 43, TIME Magazine, July 29, 1974.

Cover illustration, TIME Magazine, February 23, 1976.

Cover illustration, TIME Magazine, November 1, 1976.

Cover illustration, FORTUNE Magazine, February 12, 1979.

Cover illustration, SPORTS ILLUSTRATED Magazine, February 16, 1981.

Appendix C

Pamphlet, Department of the Treasury, United States Secret Service, "Use of Illustrations of Obligations and Securities of the United States and Foreign Governments."

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PARTIES TO THE PROCEEDING

The following individuals were defendants in the district court and are appellants in this Court: Donald T. Regan, in his capacity as Secretary of the United States Department of the Treasury; H. Stuart Knight, in his capacity as Director of the United States Secret Service; William French Smith, in his capacity as Attorney General of the United States; James R. D'Amelio, in his capacity as Special Agent in Charge of the New York Field Office of the United States Secret Service; and John S. Martin, Jr., in his capacity as United States Attorney for the Southern District of New York.

Time Incorporated was the plaintiff in the district court and is appellee in this Court. The affiliates and subsidiaries (except wholly-owned subsidiaries) of Time Incorporated are as follows:

American Cablevision of Indianapolis, Inc.
American Cablevision of Kansas City, Inc.
American Cablevision of Pennsylvania, Inc.
American Cablevision of St. Louis, Inc.
American Heritage Cablevision, Inc.
American Television of Midwest City, Inc.
ATC Cablevision of San Marino, Inc.
ATC Cablevision of South Pasadena, Inc.
Atrium Development Co.
Bartlesville Video, Inc.
Birmingham Cable Communications, Inc.
Cablevision of Durham, Inc.
Century Venture Corporation
Champaign-Urbana Communications, Inc.
Colorado Springs Cablevision, Inc.
Continental Cablevision of Richmond, Inc.
Editorial Novaro
Erie Telecommunications, Inc.
Frontier Cablevision, Inc.
Georgia-Kraft Company
Hankook Ilbo Time-Life Ltd.
Harima, M.I.D., Inc.

Hawkeye Cable Vision Corporation
Honolulu Television and Communications Corp.
Inverness/ATC Joint Venture
JLW III
Lakeside Cablevision
Laurel Cablevision, Inc.
Love Wood Products
Lower Bucks Cablevision, Inc.
Medecine et Sciences Internationals S.A.-France
Medical Science International-Brazil
Medical Science International-Japan
Memphis CATV, Inc.
Menlo Venture Corp.
Mile Hi Cablevision Associates Ltd.
Muscatine Television and Communications Corp.
New Berlin Cablevision
New England Subscription Television
N.E.W. Media, Inc.
Norman Cable TV, Inc.
Owens-Illinois De Puerto Rico
Papelera De Canarias
President Inc.-Japan
Private Channel Club of Miami
Public Cable Company
Rowohlt-Germany
Sandhill Community Antenna Corp.
Security & Guaranty Abstract Company
Shingakusha-Time
Southwest Cablevision
Temple-White Company, Inc.
Time-Life Microsonics Inc.
U.S.A. Network
Vista Cablevision Inc.
West Allis Cablevision
Wolverine Cablevision, Inc.

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY, *ET AL.*,

Appellants,

v.

TIME INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the appellee, Time Incorporated, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-33a)[1] is reported at 539 F. Supp. 1371.

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[1] References to Appellants' Jurisdictional Statement are cited as "J.S.", and to the Appendix to that Statement as "J.S. App.".

JURISDICTION

The order and judgment of the district court was entered on June 18, 1982 (J.S. App. 34a-35a). A notice of appeal to this Court pursuant to 28 U.S.C. § 1252 was filed on July 16, 1982 (J.S. App. 36a-37a). On September 13, 1982, at the request of the Solicitor General, Justice Marshall extended appellants' time for docketing the appeal to and including October 13, 1982. On October 4, 1982, at the request of the Solicitor General, Justice Marshall further extended appellants' time for docketing the appeal to and including October 27, 1982. Appellants' Jurisdictional Statement was filed on October 27, 1982. By letter dated November 26, 1982, at appellee's request, the Clerk of this Court extended appellee's time to file the instant motion to and including January 10, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Title 18, U.S.C. § 474 ¶6 and § 504 are set forth in App. A.

STATEMENT OF THE CASE

A. Factual Background

1. Time Incorporated (Time) publishes several popular magazines—TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, DISCOVER and LIFE—which report news and commentary on a multitude of subjects. All of Time's magazines make extensive use of color photographs and other artwork to depict ideas and highlight themes expressed in their texts.

During the past fifteen years, Time's editors and art directors have used photographic and other illustrations of portions of United States currency to convey information and ideas to their readers on a wide range of issues. Pictures of money have appeared in Time's magazines, *inter alia,* to symbolize the toll of inflation; to represent the economic interests at stake in a presidential election; and to convey information and editorial opinions on matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in amateur basketball (J.S. App. 10a). Examples of such illustrations are appended hereto (App. B).[2]

As a universally understood symbol which can be used to communicate ideas on many matters of contemporary public concern, and to depict phenomena—such as inflation and national deficits—which are complicated abstractions, the image of money is a uniquely versatile and powerful vehicle of symbolic visual expression. Freedom to use it in reporting the news is important to the journalists responsible for the editorial content of Time's magazines (J.S. App. 13a).[3]

Whenever an illustration of money has appeared in one of Time's magazines, the currency pictured has been significantly enlarged or reduced in size, discolored or otherwise distorted in appearance, shown only in part, and/or substantially obscured by printed legends or overlaid objects. (*See* J.S. App. 10a-13a.) Each illustration has appeared on only one side of a page, that page generally being of lightweight glossy stock. Since in most cases the expressive quality of such illustrations derives

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[2] The illustrations appended to this motion, and other, similar illustrations, appear in the record of the proceedings below. *See* Complaint at Exs. A-F, and Affidavit of Frederick A. O. Schwarz, Jr., sworn to July 20, 1981 ("Schwarz Aff.") at Exs. 1-6, 8, 10-11. The illustrations are described in detail in the Complaint (¶ 9) and the Schwarz Aff. (¶¶ 8-16), and are more briefly described in the opinion of the district court (J.S. App. 10a-13a).

[3] Explanations of the editorial value of illustrations of money to the editors and art directors of Time's magazines, and facts relating to the decisions to publish some of the illustrations appended hereto, appear in the record below in the Affidavits of Henry A. Grunwald, Editor-in-Chief of Time Incorporated; Gilbert Rogin, Managing Editor of SPORTS ILLUSTRATED; Ray C. Cave, Managing Editor of TIME Magazine; Rudolph Hoglund, Art Director of TIME Magazine; and Ronald L. Campbell, Art Director of FORTUNE Magazine, all sworn to July 17, 1981.

principally from the process of artistic interpretation and distortion, an actual-size, true-color, unembellished picture of a dollar bill—such as anyone could produce for a small charge in a color duplicating machine—is of little use to Time's journalists.

2. Chapter 25 of Title 18, U.S.C., defines and proscribes the counterfeiting, forgery or alteration of the currencies and other official obligations of the United States and foreign governments. Section 474, one of thirty-nine sections in that chapter, is captioned "Plates or stones for counterfeiting obligations or securities". Paragraphs 1st through 5th and paragraph 7th of § 474, which are not at issue here, prohibit unauthorized possession, manufacture, use, sale, importation and forgery of materials that can actually be employed for counterfeiting purposes, such as plates, stones and paper used for printing United States obligations. The sixth paragraph of § 474, however, relates to the manufacture and sale of pictures, and criminalizes, *inter alia,* the execution of any photograph or artwork "in the likeness" of any portion of any obligation of the United States. (*See* App. A.) Violations of § 474 ¶ 6 are punishable by fine up to $5,000 and imprisonment for not more than 15 years.[4]

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[4] The prohibition imposed by 18 U.S.C. § 474 ¶ 6 was originally enacted in 1864, as the eleventh section of a bill which authorized a loan badly needed to finance the Civil War. ("An Act to provide Ways and Means for the Support of the Government, and for Other Purposes," ch. 172, § 11, 13 Stat. 218 (221-22) (June 30, 1864).) The proceedings of the 38th Congress shed virtually no light on the legislature's intent with respect to this provision (J.S. App. 6a); they do reveal, however, that the "Loan Bill" was drafted in great haste, and passed under pressing time constraints by a Congress preoccupied by the threat of financial ruin. With no recorded attention, the prohibition embodied in Section 11 of the 1864 Act was carried forward in the various codifications and recodifications of the Federal laws (*id.*). It currently appears in the United States Code in substantially the same language as originally enacted, bearing precisely the same penalties as it bore 118 years ago (*id.*).

The legislative history of § 474 ¶ 6 is summarized in the opinion of the district court (J.S. App. 5a-6a). A more extensive review of the history and background of the paragraph, insofar as appellee has been able to reconstruct it, appears in the record below in the Memorandum in Support of Plaintiff's Motion for Summary Judgment, dated July 21, 1981, at A-1 to A-8.

On its face, and as interpreted by appellants and construed by the Federal courts, 18 U.S.C. § 474 ¶ 6 prohibits the execution in any manner of any and all representations of the paper money of the United States—whether good or bad, and regardless of size, shape or color. The paragraph does not require that the maker or seller of a "likeness" of currency produce or convey it with an intent to defraud; nor does it require that the "likeness" be of such character or quality as to be capable of confusing the public, or capable of being used in any manner relating to counterfeiting or forgery. (J.S. App. 13a-14a; *see also* J.S. 8.) Thus, paragraph 6th bans not only the lifelike facsimile of money executed with the intent—or at least the plausible capacity—to deceive, but also, *inter alia,* a Polaroid snapshot of a child displaying a birthday gift of a $10 bill; a room-size enlargement of the portrait of George Washington appearing on the face of a dollar, used as theatrical scenery by a drama club; and a farmer's rendering of the "shrinking" agricultural dollar, painted in water colors on the side of a barn.

In addition, since § 474 ¶ 6 also forbids every representation of "any part" of a specimen of currency, it prohibits an illustration of the *border* of a Federal Reserve Note, or of a twisted and folded $5 bill. It also condemns, for example, the execution of a leaflet bearing the words "In God We Trust" in any of the forms in which that legend appears on the reverse sides of paper currency, or a button displaying the picture of the White House as it appears on the back of a $20 bill. (*See* J.S. App. 13a-14a.) As appellants have repeatedly confirmed, the proscription embraces all illustrations of money published in Time's magazines, including those reproduced in Appendix B.

In brief, § 474 ¶ 6 imposes an absolute ban on all communication through the use of any part of the image of money.

3. In 1923, Congress modified the ban imposed by § 474 ¶ 6 to authorize certain illustrations of postage and revenue stamps. (Act of March 3, 1923, ch. 218, 42 Stat. 1437.) Thirty-five years later, apparently in response to the Treasury Department's desire to be rid of an administrative nuisance, *see* S. Rep. No. 2446, 85th Cong., 2d Sess. 5, *reprinted in* [1958] U.S. Code Cong. & Ad. News 5268, 5272, Congress expanded the exception to permit the execution of some illustrations of

money under conditions that are now set forth in 18 U.S.C. § 504(1). (Act of September 2, 1958, Pub. L. No. 85-921, § 1, 72 Stat. 1771.)[5] In creating this exception, Congress simply adopted precisely the same requirements that the Secretary of the Treasury had previously imposed when he granted "special permission" to individual applicants who requested permission to use pictures of money on an *ad hoc* basis. S. Rep. No. 2446, *supra*, at 5-6; [1958] U.S. Code Cong. & Ad. News, *supra*, at 5272; J.S. App. 8a-9a. Thus, § 504(1) permits the printing and publication of "illustrations" of currency if and only if such illustrations: (i) are in black and white; (ii) are of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of the matter illustrated; (iii) are for "numismatic, educational, historical or newsworthy purposes"; and (iv) appear in "articles, books, journals, newspapers, or albums".[6]

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[5] The Senate Committee Report states:

"The Treasury Department receives numerous requests for special permission to use illustrations of paper money and other obligations and securities of the United States for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example, in school textbooks. Collectors of old paper money likewise wish to use illustrations of such money in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money to picture the currency in circulation during a particular historical period." S. Rep. No. 2446, *supra*, at 5; [1958] U.S. Code Cong. & Ad.News, *supra*, at 5272.

Curiously absent from this list of "legitimate purposes" was the need of members of the press to report the news. The committee did note, however, that "[n]ewspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations." *Id.*

[6] Section 504(1) further requires that negatives and plates used in making illustrations permitted by that section be destroyed after their final use. Time does not object to this requirement (*see* J.S. App. 26a n.19); its concern in this suit is not with Government restrictions on the handling or disposal of materials used to print pictures, but with the statutory prohibitions on the publication of the pictures themselves. In this Court, appellants contend for the first time that the legislative ban on the publication of illustrations of money may be justified by the need to prevent possible abuse of the materials used to make such illustrations. Time's comments upon this belated theory are set forth at pp. 19-20, 28, *infra*.

The definition of an "illustration" for the purposes of § 504(1), and the definition of the "educational, historical or newsworthy" purposes for which such "illustrations" are permitted, are not set forth in Title 18 or any other Federal law. Nothing in the legislative history of the statute explains why—or if—Congress perceived any basis for believing that illustrations of currency deemed by the Secretary of the Treasury to be "newsworthy" or "educational" might be more or less amenable to use in counterfeiting than any other kind, or explains why the Secretary was deemed competent to decide what is "newsworthy" and what is not. Nor did Congress explain, *inter alia,* why black and white illustrations of paper money—the front of which is, of course, primarily black and white—were thought to pose less peril to the public than those which are pink, green or any other color.

At the same time that it enacted § 504(1), Congress also authorized a broad exemption from § 474 ¶6 for motion picture films, microfilms and slides bearing illustrations of currency and other official obligations, without restrictions as to size, color or purpose. (Act of September 2, 1958, Pub. L. No. 85-921, §1, ¶2, 72 Stat. 1771 (codified at 18 U.S.C. § 504(2).)[7] The rationale for this exemption was summarized by the Senate Judiciary Committee in a single sentence: "The counterfeiter does not use a motion-picture film, microfilm or slide in the preparation of counterfeits . . . ." S. Rep. No. 2446, *supra,* at 7; [1958] U.S. Code Cong. & Ad. News, *supra,* at 5273-74. It is equally clear, however, that the counterfeiter also does not use a distorted picture of money on the cover of FORTUNE, or the plate or negative used to produce such a distorted picture.[8]

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[7] Section 504(2) does provide that illustrations appearing on films, microfilms or slides may not be used for advertising purposes (except philatelic advertising). Section 504(1) contains a similar prohibition. The design, execution or distribution of an advertisement "in the likeness or similitude" of any obligation or security of the United States is also independently proscribed in Title 18, U.S.C. § 475. Inasmuch as this lawsuit exclusively concerns Time's right to use illustrations of money for editorial purposes, the restrictions imposed upon advertisers are not at issue.

[8] Appellants now assert that the focus of the Government's enforcement efforts under the challenged statutes "is not on the finished product, such as a distorted, oversized photograph of a dollar bill on a magazine cover, but rather on the negative used to produce the cover" (J.S. 16). The court below found, however, that like the

4. The United States Secret Service, pursuant to 18 U.S.C. § 3056, is empowered to detect and arrest any person who prints or publishes a likeness of currency which is forbidden under the foregoing statutory scheme. Pursuant to 18 U.S.C. § 492, the Department of the Treasury is authorized to demand forfeiture of anything made, possessed or used in violation of these statutes, and anything "used or fitted or intended to be used" in the making thereof. Consequently, whenever Time publishes a picture that is prohibited under Title 18, its publisher and editors risk arrest and prosecution, and Time risks forfeiture of all copies of the issue of the magazine in which the picture appears, as well as forfeiture of all the materials used in its preparation.

5. On numerous occasions within the past decade, Federal law enforcement agents have advised Time that photographs and other artwork published in its magazines—including each of the illustrations appended to this motion—violated the prohibitions of Title 18 respecting the publication of pictures of United States obligations (J.S. App. 10a-13a). Time's employees have been warned repeatedly by these agents that Time must cease and desist from publishing such pictures (*id.*). In addition, following the publication of a cover illustration depicting TIME Magazine's interpretation of the principal issue involved in the 1976 presidential election, *see* App. B-4, Time was advised that the Treasury's files indicated that it had repeatedly failed to observe the proscriptions of these criminal statutes, and warned that the matter would be referred to the United States Attorney if Time did not cease and desist from further violations (J.S. App. 12a).

In delivering these complaints and warnings, Secret Service agents and Treasury Department officials have conveyed to Time substantially inconsistent instructions as to the nature of the pictures which the Government believes that Time *may* publish. In some cases, Time has been warned that no color "likeness" of any portion of currency may appear in its magazines—regardless of the size or medium of the illustrations—but that black and white "likenesses" are permissible so

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pictures themselves, the materials used to produce Time's four-color offset magazine covers of distorted pictures of money can be of little value to the would-be counterfeiter (J.S. App. 26a n.19).

long as they conform to the size requirements set forth in § 504(1) and appear for one of the purposes approved by the statute. On another occasion, however, Time was instructed by the Assistant Legal Counsel of the Secret Service that photographs of any portion of currency are completely prohibited, regardless of size, color or purpose, because a photograph is not an "illustration" within the meaning of § 504(1).[9] More recently, Time has been admonished on several occasions that, in the view of the Department of the Treasury, (i) *all* representations of *any* currency are prohibited, regardless of size, color or medium of illustration, unless accompanied by "numismatic, educational, historical or newsworthy" information relating to the *specific* Federal Reserve Note pictured, and (ii) illustrations of money intended primarily for "decorative or eye-catching purposes" may not be used at all (J.S. App. 15a).

This last interpretation of the statute effectively obliterates the narrow exemption that § 504(1) theoretically affords. Under this view, one may publish only pictures of specific dollar bills that might by some quirk prove to be of public interest, and truly newsworthy stories about the role of money in our society may not be illustrated by means of the one image universally understood to represent their subject matter. Moreover, since the Treasury Department further maintains that, by definition, an "eye-catching" illustration cannot serve an "educational" or "newsworthy" purpose, virtually all magazine illustrations of currency are banned on this ground alone. Indeed, the very essence of a successful magazine illustration is its ability to grab a reader's attention by "catching eyes", and a prohibition on pictures intended for this purpose is in substance a proscription of illustrative communication itself.[10]

On May 18, 1981, a Secret Service agent again complained to a member of Time's legal department that a recent cover of

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[9] *See* Schwarz Aff. at ¶ 9.

[10] That this construction of § 504(1) represents the current view of the Treasury Department as to the "conditions under which it is permissible to print illustrations . . . of United States . . . obligations" was confirmed in an official publication of the Department that was transmitted to Time's legal department by a Secret Service agent approximately one week before this action was filed (*see* App. C, *infra,* at C-3, C-4), and further confirmed by appellants in the proceedings below (J.S. App. 15a n.9).

SPORTS ILLUSTRATED Magazine (App. B-6) violated Federal criminal law. The agent further declared (i) that the Secret Service intended to seize all plates and other materials involved in the production of the SPORTS ILLUSTRATED cover; (ii) that the names and addresses of all individuals and firms involved in the design and preparation of the cover must be delivered to the Service; and (iii) that the agent wished to "interview" a member of Time's management (J.S. App. 12a-13a).

Ten days later Time initiated this action, seeking a judgment declaring that § 474 ¶ 6 and § 504 are unconstitutional on their face and as applied to Time, and enjoining appellants from enforcing or threatening to enforce them. On July 21, 1981, Time moved for summary judgment. Appellants cross-moved for summary judgment on September 9, 1981.

B. Time's Principal Contentions in the District Court

Time's principal claims in the district court were, *first,* that the prohibitions imposed in § 474 ¶ 6 and § 504 are impermissibly overbroad, and fail to satisfy this Court's standards for regulatory statutes abridging freedom of expression; and *second,* that § 504 is independently unlawful because it creates a content-based standard for permitted speech, and because it is impermissibly vague in violation of the Due Process Clause.

1. It is plain from the face of the challenged statutes that the prohibitions they impose were intended solely as anti-counterfeiting measures. While not "aimed" at speech, the statutory scheme in question directly and dramatically abridges the freedom to communicate by means of a potent medium of symbolic expression. And in an area where the Constitution demands that regulatory statutes be narrowly drawn to further the Government's ends without unnecessary intrusion upon protected expression,[11] the means adopted here lurch widely

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[11] *See, e.g., Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 633, 637 (1980); *Hynes v. Mayor of Oradell,* 425 U.S. 610, 620 (1976); *Police Department of Chicago v. Mosley,* 408 U.S. 92, 98-99 (1972); *Gooding v. Wilson,* 405 U.S. 518, 522 (1972); *Zwickler v. Koota,* 389 U.S. 241, 250 (1967); *United States v. Robel,* 389 U.S. 258, 264-66 (1967); *Aptheker v. Secretary of State,* 378 U.S. 500, 509 (1964); *NAACP v. Alabama,* 377 U.S. 288, 307 (1964); *NAACP v. Button,* 371 U.S. 415, 438 (1963); *Martin v. City of Struthers,* 319 U.S. 141, 146-49 (1943); *Cantwell v. Connecticut,* 310 U.S. 296, 310-11 (1940).

and erratically far of the mark. In a nutshell, the regulatory scheme challenged in this action bans the execution and publication of pictures which pose no conceivable danger to the public interest in prevention of counterfeiting, and which are unmistakably intended and necessarily understood solely as instruments for the communication of ideas.

a. Both the massive overbreadth of § 474 ¶ 6 and the expressive significance of the conduct it condemns are best appreciated not by hypothetical examples, but by the actual applications of the law by the Federal officials charged with its enforcement—*e.g.*, to the distorted, discolored, fragmented magazine illustrations appended to this motion. Recently, the statute was also found to justify the confiscation by the Secret Service of a *three-foot-long* poster of a Federal Reserve Note that had been doctored to appear as a "$30" "Inflationary Note" with a picture of former President Richard Nixon in the center, and had been executed by the artist, Gale Wagner, as a political statement on Mr. Nixon's economic policies and his involvement in the "Watergate" affair. *Wagner v. Simon,* 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd,* 534 F.2d 833 (8th Cir. 1976). The criminalization of such artwork under an anti-counterfeiting law surely lends new meaning to the concept of "broadly prophylactic" regulation of protected expression. *See, e.g., Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 70 (1981); *NAACP v. Button,* 371 U.S. 415, 438 (1963).

b. The arbitrary requirements for exemption set forth in § 504(1) cannot relieve the constitutional infirmity of § 474 ¶ 6. Section 504(1) simply perpetuates the ban on all pictures of currency which fail to satisfy a list of irrational requirements as to size, color, forum and purpose. Consideration of the kinds of illustrations which this statutory scheme condemns reveals that Congress has indiscriminately "lumped together" pictures that might pose a risk to public welfare with those that positively cannot, failing "to employ more precise measures to separate one kind from the other", as the Constitution requires. *See Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980).

Thus, Gale Wagner's oversized, distorted, black and white artwork was senselessly denied exemption under § 504(1)

solely because it did not appear in something the Secretary of the Treasury adjudged to be an "article, book, journal, newspaper or album". Similarly, a black and white likeness of a fragment of currency—for example, the photograph of the center portrait of George Washington on a $1 bill which appeared (surrounded by a life preserver) as an inside illustration in TIME Magazine (App. B-2)—is arbitrarily included within the ban because so much of a dollar as was shown appeared roughly true-to-size. By the same token, drastically off-size magazine illustrations of portions of money in any color—like the examples annexed here as App. B-1 and B-4 to B-6—are arbitrarily proscribed because they are not in black and white. In a word, there is no meaningful relationship, much less a substantial relationship, between the scope of the prohibitions imposed by these statutes and the protection of public safety: most of the illustrations condemned by these Federal laws are no more likely to threaten the public welfare than those arbitrarily allowed.

2. Wholly apart from its inadequacy as a means for distinguishing conduct that endangers public safety from protected speech, § 504 is facially unconstitutional because it creates a content-based standard for approved speech that is, in addition, unconstitutionally vague.

a. It is by now axiomatic that "time, place and manner regulations must be 'applicable to all speech irrespective of content.' " *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536 (1980) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)); *accord, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516-17 (1981); *Heffron v. ISKCON*, 452 U.S. 640, 648 (1981). By requiring that permitted illustrations of money serve "numismatic, educational, historical or newsworthy" purposes, § 504(1) self-evidently violates this principle. The test is, of course, irrational, because the question whether a photograph is "newsworthy" or "educational" can have nothing whatever to do with its utility for counterfeiting. In addition, the requirement plainly distinguishes lawful from unlawful speech on the basis of its content: whatever these words may mean to the beholder, the inquiry whether a picture is "newsworthy" or "educational" can only be answered on the basis of a judgment about the nature or quality of its message. This judgment cannot be the

Government's to make. *See, e.g., Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 537-38.

b. The concept that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes," *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)), has long been recognized to carry special force when applied to a statute inhibiting expression. "[A] man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959), *quoted in Hynes v. Mayor of Oradell*, 425 U.S. at 620; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961). In addition, the vagueness doctrine has the special office in the First Amendment context of minimizing the risk of arbitrary and discriminatory application of criminal statutes by law enforcement officials and triers of fact. *Smith v. Goguen*, 415 U.S. 566, 572-74 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As this Court recently observed in *Hynes*, a vague regulation affecting speech which fails to inform those covered by the statute how they may comply, and to specify narrow, objective standards for those who must apply it, gives to the police "*effective* power" to grant or deny permission to speak based upon arbitrary and subjective judgments. *Hynes v. Mayor of Oradell*, 425 U.S. at 622 (emphasis by the Court).

Like the limitation of permitted canvassing to "recognized charitable causes" in *Hynes*, a statute limiting permitted pictures to those which serve unspecified "educational, historical or newsworthy" purposes confers upon the Government the authority to determine the reasons for which the speech regulated by § 504 will be allowed. The statute thus offends the values at the very core of the vagueness doctrine. The perils of its vagueness have in fact been realized in the varying interpretations of § 504 put forth by the Secret Service and the Treasury Department (*see* pp. 8-9, *supra*). And in the Treasury's most recent construction (p. 9, *supra*), the vagueness of the statute has yielded precisely the consequence the vagueness doctrine was designed to forestall: even the most careful citizen could not divine from the face of the statute that rational law enforcement officials could draw these meanings from the text.

C. The Decision of the District Court

In a 53-page opinion, the district court held that § 474 ¶ 6 is unconstitutionally overbroad; that § 504 creates an unconstitutional content-based standard for permitted speech; that § 504 is constitutionally unacceptable as a regulation of the time, place and manner of expression; and that § 504 is unconstitutionally vague.

The district court found at the threshold that the visual image of money is a "powerful, expressive symbol", and that Time's use of the symbol in its magazines—"to dramatize or illustrate a set of facts, an existing condition, a moral crisis, a course of conduct"—constitutes protected speech (J.S. App. 19a-20a). Relying on principles of First Amendment jurisprudence to which this Court has adhered for more than forty years, the district court noted that regulatory statutes which abridge protected speech must be narrowly drawn to further legitimate and substantial governmental interests, and entail no greater intrusion on First Amendment freedoms than is necessary to promote the government's permissible goals.

> "Where a statute impinges upon protected speech, the burden is on the government to establish the validity of its asserted interest. *Schneider v. State,* [308 U.S. 147,] 161 [(1939)]. The judiciary has an overriding obligation 'to assess the substantiality of the justification[s] offered,' *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 69 (1981), and to ensure that the regulation promotes legitimate governmental ends with minimal intrusion on First Amendment freedoms. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980); *Hynes v.* [*Mayor of*] *Oradell,* 425 U.S. 610 (1976). 'The breadth of the legislative abridgment must be viewed in the light of less dramatic means for achieving the same basic purpose.' *Shelton v. Tucker,* [364 U.S. 479,] 488 [(1960)]. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button,* 371 U.S. 415, 438 (1963). *See Keyishian v. Board of Regents,* 385 U.S. 589, 604 (1967)." (J.S. App. 22a.)

Against the backdrop of these long-settled propositions and the uncontroverted statements of fact in the affidavits submitted by

Time, the court considered the two Federal statutes at issue here.

1. Turning first to § 474 ¶ 6, the district court noted that appellants had proferred two justifications for that statute: first, that the ban on execution of "likenesses" of currency "prevent[s] counterfeiting"; and second, that the prohibition "protect[s] the value [of] and respect for instruments issued as the official obligations and securities of the United States." (J.S. App. 26a, quoting Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, September 9, 1981, at 8).

The first theory, the court observed, articulates a compelling government interest—a point Time has never disputed. However, the court found, the prohibition imposed by § 474 ¶ 6—which "casts its net over any and all likenesses of . . . currency[,] whether or not any given likenesses has the capacity to deceive or to act as a vehicle for counterfeiting," (J.S. App. 26a)—is not drawn with the specificity required to avoid unnecessary intrusion upon protected speech.

> "Neither the illustrations of money used by plaintiff nor the plates used to print those illustrations can be used to counterfeit money, or as counterfeit money. To criminalize illustrations such as those employed by plaintiff that have no utility for fraud or forgery and that cannot be used for counterfeiting, but which do serve as vehicles for artistic or journalistic expression, violates the First Amendment by unduly interfering with protected speech. There are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse." (J.S. App. 26a-27a, footnote omitted.)

Appellants' second justification for § 474 ¶ 6, the court found, "is quite simply . . . constitutionally impermissible."

> "When this justification is analyzed, it can only mean that § 474 bans the use of illustrations of money because of the ideas such illustrations may symbolically represent. This runs counter to the constitutional doctrine that the government may neither prohibit nor prescribe the form or content of individual expression, absent a compelling state

> interest. *Police Department of the City of Chicago v. Mosley*, [408 U.S. 92,] 95, 98 [(1972)]. The government cannot compel or prohibit respect for any symbol or idea in this country. *Stromberg v. California*, 283 U.S. 359 (1931) (state prohibition of display of red flag struck down); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (mandatory salute of the American flag invalidated); *Street v. New York*, 394 U.S. 576 (1969) (conviction for "disrespectful" language about the flag set aside); *Schacht v. United States*, 398 U.S. 58 (1970) (punishment for theatrical use of a uniform which was critical of the Army invalidated). Neither plaintiff nor any citizen can be compelled by the government to pay respect to the dollar. The sixth paragraph of § 474 cannot be justified as protecting, by restraining speech, 'the value [of] and respect for' currency issued by the government." (J.S. App. 27a, footnote omitted.)

As a facially overbroad ban on protected speech, therefore, the proscription in § 474 ¶ 6 did not withstand constitutional scrutiny (J.S. App. 28a).

2. Proceeding to § 504(1), the district court found that statute "draws lines: it is a time, place and manner regulation that creates distinctions among illustrations of currency based on criteria relating to content, purpose and forum in which the illustration appears" (J.S. App. 29a). The court held § 504(1) to be constitutionally infirm on at least three grounds.

First, the court found that § 504(1) creates an unacceptable content-based standard for permitted speech:

> "Section 504's concern with 'philatelic, numismatic, educational, historical, or newsworthy' purposes is constitutionally impermissible. Governmental action that regulates speech on the basis of its subject matter ' "slip[s] from the neutrality of time, place, and circumstance into a concern about content." ' *Police Department of the City of Chicago v. Mosley, supra*, 408 U.S. at 99, quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29. In enforcing § 504, the government decides whether the purpose of the illustration is 'philate-

> lic, numismatic, educational, historical or newsworthy' and whether the forum in which it appears is indeed an article, a book, a journal, a newspaper or an album. Such decisions are based on content or subject matter. Succinctly put, § 504 requires judgments about the nature and quality of the message contained in the illustration, about the nature and quality of the article to which the illustration relates, and about the nature of the forum containing the illustration, types of judgment the First Amendment prohibits the government from making. *Cohen v. California,* 403 U.S. 15, 24 (1971); *Thornhill v. Alabama,* [310 U.S. 88 (1940)]." (J.S. App. 29a.)

Second, guided by this Court's recent decision in *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), the district court considered the acceptability of § 504(1) as an exercise in legislative line-drawing. In *Village of Schaumburg,* a residential suburban community sought to regulate the activities of peddlers and door-to-door solicitors by requiring that charitable organizations desiring to raise funds through house-to-house solicitation demonstrate that at least 75% of their receipts would be used directly for the charitable purposes of the organization. Plaintiff there, an advocacy-oriented organization which could not satisfy the 75% requirement because its receipts were used principally for organizational and administrative costs, contended that the statute was facially invalid because the lines it drew were insufficiently related to the Village's goals of preventing crime and fraud. Affirming the lower courts' conclusion that the ordinance was facially overbroad, this Court agreed that the interests asserted by the Village were "indeed substantial", but were "only peripherally promoted" by the 75% requirement, and "could be sufficiently served by measures less destructive of First Amendment interests." 444 U.S. at 636.

The district court here concluded that the statutory scheme reflected in § 504(1) fails to satisfy the "tight nexus" demanded by *Village of Schaumburg* between statutory means and governmental ends (J.S. App. 30a).

> "There is no relationship between the distinctions among the purposes and forums, and the evils that the statute purportedly targets. . . .

> "Just as an organization which spends more than 25% of its receipts for non-charitable purposes is no more likely to commit fraud or crime than an organization spending less than 25% of its receipts for non-charitable purposes, the illustrations banned by the provisions under challenge here are no more likely to threaten the public welfare than those arbitrarily allowed. As a charity's ability to fulfill the 75% requirement bears no relationship to the likelihood of its solicitors to commit fraud or crime, the newsworthiness or educational value of an illustration, or the forum in which it appears, has little to do with its capacity to defraud the public." (J.S. App. 30a-31a.)

Third, applying the standard reaffirmed in *Hynes v. Mayor of Oradell*, the district court held that § 504(1) is, in addition, unconstitutionally vague. Initially, the court noted that "[i]t has long been recognized that time, place and manner regulations which vest in law enforcement authorities the capacity for discretionary enforcement or subjective definition of an offense are instruments for censorship" (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Heffron v. ISKCON*, 452 U.S. 640 (1981)) (J.S. App. 31a-32a, footnote omitted). "The determination of what is 'philatelic, numismatic, educational, historical, or newsworthy,'" the court observed, "is rife with assumption and open to varying interpretation," and "[t]he definition of a journal, newspaper or album is anyone's game to play" (J.S. App. 31a). In addition, the "vice of vagueness" in § 504(1) is "starkly illustrated" by the construction adopted by the Treasury Department, which reduces the statutory exemption "to the vanishing point." (J.S. App. 31a n.23; *see* p. 9, *supra*.) "The distinctions drawn by § 504 do not clearly delineate the area of forbidden conduct, which forces the public to guess at its essential meaning in violation of due process of law. *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Hynes v. Mayor of Oradell*, *supra*, 425 U.S. at 620" (J.S. App. 32a).

For the foregoing reasons, the district court concluded that the Federal statutes here at issue are unconstitutional on their face and as applied to Time, and ordered the entry of a judgment so declaring.[12]

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[12] Since a declaratory judgment was to be entered by which appellants would be bound, the district court declined to issue an injunction (J.S. App. 32a n.24). Appellee has not cross-appealed this portion of the district court's judgment.

ARGUMENT

In a carefully reasoned opinion, the district court properly applied to simple and straightforward constitutional claims principles of First Amendment jurisprudence that have been repeatedly reaffirmed by this Court. The judgment appealed from is so plainly correct, and so manifestly compelled by the prior rulings of this Court, that a plenary hearing is not required.

For several months following entry of the judgment below, appellants were undecided whether to take this appeal at all.[13] Now that they have done so, they would have this Court believe that preservation of the statutes found by the district court to be constitutionally infirm is essential to the Government's ability to protect the Nation's currency. To bolster this suggestion, appellants have produced in this Court a statement attributed to a Deputy Assistant Secretary of the Treasury which summarizes a series of laudable efforts by Secret Service agents to detect and arrest persons actually engaged in counterfeiting. The statement also warns darkly of the hazards of unscrupulous use of plates and negatives, and repeatedly urges the view that liberalization of the law to accommodate the requirements of "legitimate" printers would endanger the republic by "tempting" such persons to turn their skills to criminal ends. (J.S. App. 41a, 43a.)

Appellants' approach here makes it important to recall that this lawsuit is exclusively concerned with the scope of the Government's power to ban the publication of *pictures*. *Not* at issue in the case is the Government's power to monitor or reasonably to regulate the handling and disposal of materials by which pictures are made. Nor does this suit concern the Government's power to detect and punish criminals like the persons described in the Treasury Department's statement, each of whom could be prosecuted without resort to § 474 ¶ 6

[13] The Solicitor General's first application to Justice Marshall for an extension of time to docket the appeal asserted that additional time was needed, *inter alia*, "to examine the ramifications of the district court's opinion in order to decide whether to docket an appeal . . . ." Appellants' Application for an Extension of Time, September 1982, at 2.

under the several sections of Chapter 25 which outlaw counterfeiting.[14]

On the subject of outlawed *pictures,* appellants' comments are limited. They could not and do not purport to defend the challenged statutes on the ground that they distinguish lawful from unlawful pictures based upon their possible utility to persons bent on crime. And while conceding that Time has been repeatedly advised that illustrations appearing in its magazines violate these statutes, and repeatedly warned to cease and desist from publishing such pictures, appellants do not attempt to argue that any of the photographs or artwork published in Time's magazines could possibly be confused for genuine currency, or serve any purpose in a counterfeiting plan.

Such arguments as appellants have mustered in defense of the challenged statutes may be briefly dispatched.

1. Section 474 ¶ 6.

Appellants fully agree that 18 U.S.C. § 474 ¶ 6 is a "broad" (J.S. 4, 5) and "flat" (J.S. 11, 16) prohibition which bans any and all illustrations of money "without regard to whether . . . [they] are capable of deceiving the public" (J.S. 8). Their central legal defense of this statute is expressed in the thought that "the First Amendment does not entitle an individual to communicate in precisely the manner he may deem to be most effective, especially where the limitation on expression is unrelated to the content of the message and the individual has

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[14] Appellants' discussion of the result below obscures the fact that the court's order invalidated exactly one section and one paragraph of another section out of the 39 sections in Chapter 25. Among those which remain, wholly unaffected by the decision below, are the statutes which make it a crime to forge, counterfeit or alter any United States obligation with intent to defraud, 18 U.S.C. § 471; to pass, utter, publish or sell (or attempt to pass, utter, publish or sell), or to import, possess or conceal, a forged, counterfeited or altered obligation with intent to defraud, § 472; or to buy, sell, exchange, transfer, receive or deliver any forged, counterfeited or altered obligation with the intent that the same be passed, published or used as true and genuine, § 473. And given appellants' new preoccupation with plates and negatives, it is worthwhile to note that the district court's judgment has no effect whatever on the provisions of § 474 other than paragraph 6th. Thus, *inter alia*, it is still very much a crime to make or execute "any plate, stone or other thing in the likeness" of a plate used to print an obligation of the United States, § 474 ¶ 2.

available numerous alternative means for conveying [the] message" (J.S. 10). In support of this proposition appellants invite the Court's attention to *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), and urge an analogy to this Court's decisions in *Greer v. Spock*, 424 U.S. 828 (1976) and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

a. As it happens, Time and all other citizens probably *are* entitled "to communicate in precisely the manner [they] may deem to be most effective", *unless* the Government can explain why they should not do so. *See, e.g., Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 533-35. However, that is not the issue here. The issue is whether a statutory scheme which significantly restricts the editorial content of Time's magazines in the name of safeguarding the currency satisfies the constitutional standards for regulatory statutes abridging freedom of speech.

It is not a defense of § 474 ¶6 to suggest that the use of a powerful expressive symbol by Time or anyone else can be suppressed because, in the Government's view, the idea it represents may be voiced another way. The argument recalls Harold Spence's prosecution in 1970 by the State of Washington for displaying an American flag with a "peace symbol" attached to it in protest of American military activity in Cambodia and the killing of students at Kent State University. One ground on which the Washington Supreme Court sustained Spence's conviction was the theory that the inhibition on his freedom of expression created by the State law was "miniscule and trifling": there were, in the court's estimation, "thousands of other means available to [him] for the dissemination of his personal views." *State v. Spence*, 81 Wash. 2d 788, 799-800, 506 P.2d 293, 300-01 (1973), *quoted in Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974). In reversing, this Court rejected that argument "summarily", on the strength of the forty-year-old observation that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939), *quoted in Spence v. Washington*, 418 U.S. at 411 n.4; *accord, Schad v. Borough of Mt. Ephraim*, 452 U.S. at 76-77; *Southeastern Promotions Ltd. v.*

Conrad, 420 U.S. 546, 556 (1975); *Thornhill v. Alabama*, 310 U.S. at 105-06. If § 474 ¶6 is valid, it cannot be because the Government thinks that Time ought to be able to report the news another way.

b. *Greenburgh* and the other authorities cited by appellants do not hold otherwise.

In *Greenburgh*, a group of civic associations which habitually communicated by placing unstamped written material in residential letter boxes challenged the validity of a Federal law, 18 U.S.C. § 1725, which prohibits the deposit of mailable matter in letter boxes without the payment of postage. This Court found no impermissible abridgment of the associations' First Amendment rights in the requirement that those who use the facilities of the Postal Service pay appropriate postage for doing so. At least three factors distinguish that case from the present claim.

(i) As Justice Rehnquist emphasized in his opinion for the Court, the aggrieved associations in *Greenburgh* suffered no constraint upon their right to use the mail for any sort of communication, so long as they paid the postage. The burden on their speech, if any, was the expense and time consumed in sending matter destined for letter boxes through the postal system. 453 U.S. at 127. The statute imposed no restriction on the content, volume or appearance of the messages plaintiffs wished to convey.

By contrast, Time's objection to § 474 ¶ 6 is that photographs and artwork which it wishes to use to report the news to the public may not be used *at all*. We deal here not with a burden relating to the cost or convenience of expression, such as obtained in *Greenburgh*, but with a prohibition upon speech itself.[15]

(ii) Like *Greer* before it, *Greenburgh* involved a claim of access to property under the Federal Government's control for purposes inconsistent with the Government's own. A majority

[15] The nature of the burden on speech at issue in *Greenburgh* is akin to the burden created by the portion of § 504(1) which requires that plates and other materials used to prepare *permitted* illustrations of currency be destroyed after their final use. As noted above, Time has made plain in this lawsuit that it has no objection to such a requirement (*see* J.S. App. 26a n.19), notwithstanding the additional time, expense and administrative burdens that it may entail.

of this Court viewed the case as presenting the question whether a letter box constitutes a "public forum", and concluded that it does not. The majority's decision was thus explicable by reference to the familiar principle that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greenburgh*, 453 U.S. at 129-30, quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (state may bar demonstrators from portions of county jail reserved for jail purposes), and *Greer v. Spock*, 424 U.S. at 836 (civilian political campaign speeches and pamphleteering properly excludable from Federal military installation devoted to basic combat training). Nothing could be clearer than that an effort by the Government to regulate what a publisher chooses to say, or how the publisher chooses to say it, in the pages of his own magazine, bears a greater burden of justification under the First Amendment than regulations which secure a prison, a military base, or a Federal letter box. In point of fact, as the district court realized, this case has nothing whatever to do with the Government's right to bar from its facilities speech that might disrupt the Government's legitimate purposes. No amount of torture of a counterfeiting law can transform this lawsuit into a debate over the dimensions of the concept of the "public forum".[16]

(iii) Finally, *Greenburgh* (like *Greer* and *Lehman*) is illustrative of a line of authorities in this Court involving conduct which combines "speech" and "nonspeech" elements, in the sense that the mode of expression selected by the speaker necessarily entails activity by the speaker which could impair public safety or welfare. Like the act of picketing a military

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[16] In an effort to bring this case within the rule of *Greenburgh* and *Greer*, appellants have minted the theory in this Court that "the design and appearance of United States obligations . . . are as much the 'property' of the government . . . as . . . the military base in *Greer*," (J.S. 11)—and, presumably, the letter boxes in *Greenburgh*. Indeed, appellants now claim that this anti-counterfeiting law is in effect "a copyright statute"! (J.S. 11 n.7.) The contention, if seriously intended, is unworthy of the Government. And if appellants are saying here that Time's distorted pictures of money impair the "integrity" of the Government's property (*see* J.S. 11), they have returned to the thesis that Time must pay homage to the Government's symbol, a notion decisively and properly rejected in the court below, *see* pp. 15-16, *supra*.

installation to protest a war, the mode of communication selected by plaintiffs in *Greenburgh* inherently entailed dangers to the effective operation of a Government service. Evidence offered at trial tended to show that reservation of letter boxes to posted mail was important, *inter alia*, to facilitate secure delivery by reducing overcrowding; to facilitate the investigation and prevention of mail theft; to promote the privacy of postal customers; and to protect mail revenues and minimize costs. *Greenburgh*, 453 U.S. at 117-18. It was thus appropriate for the Court to assess both the need for the restriction and the nature and extent of its burden on speech, and to conclude that the incidental constraint upon free expression of which the civic associations complained did not amount to an impermissible abridgment of rights secured by the First Amendment.

By contrast, the pictures at issue in this action involve speech alone: appellants have offered nothing to suggest how or why the Government's interest in prevention of counterfeiting might be furthered by the application of § 474 ¶ 6 to the fragmentary and distorted illustrations published by Time. Thus, we do not have here a demonstrably "substantial" government need to regulate conduct in a manner which inevitably entails restraint on speech. We have instead patently innocuous pictures which can endanger no one, but constitute important editorial material for Time and powerful means of symbolic expression generally.

The cases cited by appellants furnish no aid in justifying the application of a counterfeiting statute to speech which poses no danger of counterfeiting.

2. Section 504.

a. Appellants several times assert that the limitations imposed in § 504 are constitutionally sound because they "are not directed at the content of the stories that appellee or [others] may seek to illustrate . . . , [but] merely [at] the manner in which an illustration may be presented" (J.S. 12). The statement is disingenuous. Time has never suggested that the restraints in § 504 are aimed at the content of *stories;* they are, however, indisputably addressed to the content of *pictures.* And as the district court observed, the question whether an illustration serves an "educational" or "newsworthy" pur-

pose—which has, in any case, nothing to do with its potential for use in counterfeiting—is necessarily answered by reference to the nature or quality of the message or information the illustration conveys, and the nature and quality of the text to which it relates (J.S. App. 29a). Appellants offer no suggestion as to how this limitation can be deemed to concern anything other than the content of speech, and there is none.

b. Appellants next maintain that the district court's constitutional objections to §504 are unfounded because (i) appellants do not think that any magazine publisher would "have difficulty" satisfying the requirements that the district court found to be impermissibly content-based (J.S. 13); (ii) the statute does not expressly authorize censorship by the Government based upon a speaker's "particular point of view", and has not yet (in appellants' opinion) been used for this purpose (*id.*); and (iii) a person of ordinary intelligence should know what the language of the statute means (*id.*).

The record below establishes that Time has been repeatedly warned to cease publishing pictures of which no two Government agents have yet been able to supply an intelligible common definition (*see* pp. 8-9, *supra*). Indeed, it is plain from appellants' Jurisdictional Statement, as it was in the court below, that the principal Federal agencies charged with the enforcement of these statutes cannot agree among themselves as to what the statutes mean. The Treasury Department has unequivocally declared that an illustration of currency can satisfy the exemption provided in §504 only if it pictures (in a non-"decorative" or "eye-catching" fashion, and accompanied by informative text) *specific* Federal Reserve Notes of "numismatic, historical, educational or newsworthy" value. The Department of Justice maintains, however, that this "opinion" of the Treasury Department is "advisory only" as far as it is concerned (J.S. 14 n.9)—although it does not expressly declare that it *rejects* the Treasury's interpretation. In any event, since the Treasury Department is the agency empowered to detect and arrest violators of the statute and to seize offending materials, its "opinion" is certainly pertinent from the perspective of the citizen whose liberty and property are at peril. And under the Treasury's view of the statute (*see* p. 9, *supra*), any magazine publisher would certainly have difficulty satis-

fying the requirements as to permissible "purpose"—indeed, none of the illustrations Time has published in the past, or is ever likely to publish, could qualify.[17]

The fundamental question, however, is not whether Time or anyone else would "have difficulty" satisfying whatever reading of the statute that appellants (or any one of them) may choose to adopt at a particular time, but whether the statutory restrictions have any substantial justification in relation to the legislative goal. As the district court found, they do not.

By the same token, Time submits that appellants' happy assurance that the statutory tests have not yet been used as vehicles for censorship of speech based on the speaker's point of view cannot satisfy the constitutional requirements that a regulation constraining speech have a legitimate and substantial reason for existing, and that "time, place and manner" regulations be crafted so as to minimize the possibility of discretionary enforcement and arbitrary suppression. *See Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); *Hague v. CIO*, 307 U.S. 496, 516 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

c. Appellants' final point is that, even if the district court's objections to § 504 were well-founded, the court should have "saved" the statute by construing its terms so as to avoid or alleviate their constitutional infirmities. Alternatively, appellants contend, the proper solution was to invalidate *only* § 504—leaving as the law of the land the sweeping ban

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[17] Appellants' assertion that the "purpose" and "forum" provisions of § 504 have never served as a basis for enforcement of the statute (J.S. 13) is flatly wrong, as well as beside the point. As noted above, the artwork confiscated by the Secret Service in *Wagner v. Simon* violated the Federal law solely because it did not appear in one of the approved "forums". In any event, no Federal agency has ever disavowed the possibility of enforcement and prosecution for violation of *any* of the requirements of these statutes. Moreover, in light of the fact that the Treasury Department's construction of § 504 renders all of Time's pictures *independently* unlawful under the "purpose" requirement (*see* p. 9, *supra*), appellants' suggestion that Time lacks "standing" to challenge this or any other element of the statutory scheme is unsupportable. *See* J.S. App. 15a-19a; *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

imposed in § 474 ¶ 6, which the district court found at the outset to be a facially overbroad intrusion on protected speech.

To develop a possible "saving" construction, appellants press the view that the terms of § 504 which limit illustrations of money to certain permitted purposes and certain approved forums were in fact intended to proscribe only "facsimiles", and to allow the use of such illustrations in "publications" (J.S. 13, 14). There is no evidence that appellants (and particularly the Treasury Department) have ever acknowledged this supposed intention in their own prior interpretations of the law (*see* pp. 8-9, *supra*, and App. C), and the fact they have not done so is not surprising: the construction they now propose reduces to a nullity a substantial portion of the language in the statute Congress actually passed. That the district court did not adopt this construction is also not surprising, for appellants did not urge it or any other "saving" construction of § 504 in that court, but contended only that the challenged statutory scheme is acceptable in all respects. And while it is true that a court must attempt to construe statutory language to avoid constitutional problems if at all possible, a judge is not at liberty to engage in wholesale revision of a criminal law. *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964); *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). In substance, that is what appellants now maintain should have been done here.

In any event, the construction of § 504 which appellants now propose would not in fact "save" it. In the first place, the enforcement of § 474 ¶ 6 against the artwork executed by Gale Wagner (*see* p. 11, *supra*) succinctly demonstrates the indefensibility of confining permitted pictures to "publications". As the district court observed, the forum in which an illustration appears has little to do with its capacity to defraud the public (J.S. App. 30a-31a). The notion that a three-foot-long poster of a vastly distorted bill poses any greater danger than an illustration of a dollar appearing in a "publication" is simply unsupportable. Indeed, appellants do not explain at all the rationale for this limitation in their suggested interpretation of the statute.

Moreover, appellants' proposed reading of § 504 deals only with the "purpose" and "forum" requirements of the statute, and fails to address the equally irrational restriction as

to color. In the court below, Time demonstrated in considerable detail that the narrow exemption permitting it to publish only black and white illustrations of money is substantially useless to its magazines.[18] And as the illustrations appended to this motion reveal, Time's dramatically off-size and distorted pictures of portions of money have no greater capacity to deceive when printed in color than when they appear in black and white. There is thus no legitimate basis for the imposition of this restriction upon protected speech.

Appellants do not contend otherwise. The most that they offer in defense of the complete prohibition on color is the new assertion by the Treasury Department that the process of preparing color pictures more closely resembles the preparation of actual counterfeits, thus "bring[ing] legitimate printers a few steps closer to an actual counterfeiting operation" (J.S. 16 n.10; J.S. App. 43a).

There is no reason to believe that materials used to prepare Time's distorted illustrations could be of any aid to a counterfeiter (*see* J.S. App. 26a n.19), and appellants have offered no evidence to the contrary. In any event, if the Government believes that potential abuse of such materials is in fact the evil to be avoided, a host of precautions could be devised to cope specifically with that problem, without imposing criminal sanctions for *pictures* that appellants essentially concede to be innocuous (*see* J.S. 16). Finally, the suggestion that the prohibition on color must be maintained to forestall the risk that unscrupulous printers will perceive the means of copying currency, and be inspired to do so for profit (*see* J.S. App. 13a, 41a), epitomizes the danger of "broadly prophylactic" regulation of speech. If, as no one appears to dispute, Time's pictures are protected by the First Amendment, the Government may no more ban them on the ground that their preparation carries a "power of suggestion" or incentive for unlawful conduct by Time's artists and printers than it could ban the publication of murder mysteries to prevent public education in techniques of homicide.

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[18] *See, e.g.*, Affidavit of Henry Grunwald at ¶¶ 14, 17; Affidavit of Ray C. Cave at ¶¶ 12-14; Affidavit of Gilbert Rogin at ¶ 8, all sworn to July 17, 1981.

In sum, appellants' proposed construction of § 504 does *not* resolve its constitutional infirmities. The alternative solution of invalidating one unconstitutional statute but leaving another cannot be seriously considered. Nor is it surprising that these devices do not avail in this case. The requirements of the statutes that Congress wrote bear no substantial relationship to the goal of prevention of counterfeiting, and there is neither logic nor authority for a court to bend into another form statutory tests which it has found to be wholly unjustified in the first place.

Rather than seeking in the first instance affirmatively to define the "likenesses" of money which might realistically imperil the security of the currency, almost 120 years ago Congress enacted a broad negative—a blanket ban whose objectives are by now thoroughly obscure, and whose language admits of no principled distinctions. Ninety-four years later, instead of attempting to correct the fundamental problem by repealing the statute and starting again, Congress chose to engraft upon the ban a series of carelessly constructed and unconstitutional exceptions, borrowed without evident meaningful appraisal from the customary practices of the Treasury Department. Thus, even though the First Amendment ensures that all speech is permitted except that which is expressly and justifiably forbidden, the premise of the present statutory scheme is exactly contrary: all use of a particular expressive symbol is prohibited except that which the Government allows.

The solution to the problem presented in this case is not judicial manipulation of a pair of indefensible statutes, but a new law that Congress plainly knows how to write.[19] The

[19] In recent House proposals for a general revision of Title 18, the current welter of counterfeiting laws in Chapter 25 would have been replaced by a single provision making it a crime, *inter alia*, knowingly to make, conceal, utter or possess a counterfeit written instrument *"with intent to defraud another person or a government"*. *See* H.R. 5703, 97th Cong., 2d Sess. § 2541(a)(1982); H.R. 5679, 97th Cong., 2d Sess. § 2541(a)(1982); H.R. 4711, 97th Cong., 1st Sess. § 2541(a)(1981); H.R. 1647, 97th Cong., 1st Sess. § 2541(a)(1981) (emphasis supplied). A recent Senate proposal would similarly have substituted for the various counterfeiting provisions of the current

current law prohibits speech which poses no risk to the realization of the Government's interest in prevention of counterfeiting, and regulates such speech as the Government allows based upon criteria which bear no substantial relation to the fulfillment of that interest. The statutes in question were thus properly struck down in the court below.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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January 10, 1983

Title 18 a single offense, again defined as the making, uttering or possession of a counterfeit written instrument "*with intent to deceive or harm another person or a government*". S. 1630, 97th Cong., 1st Sess. § 1741(a)(1981) (emphasis supplied).

Under all of these bills, the critical focus would quite properly be on the intent of the actor, and the senseless preoccupation with the size, color, purpose and location of pictures that now characterizes § 504 would be abandoned. Agents of the Secret Service could still vigorously pursue would-be counterfeiters, but would be denied the opportunity for chronic, pointless harassment of magazine publishers—or individual artists—for the publication of distorted pictures which all agree to be harmless.

APPENDIX A

Title 18, U.S.C. § 474 ¶ 6 (1976)

"Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States], or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States;

". . . .

"Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Title 18, U.S.C. § 504 (1976)

Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illus-

trations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

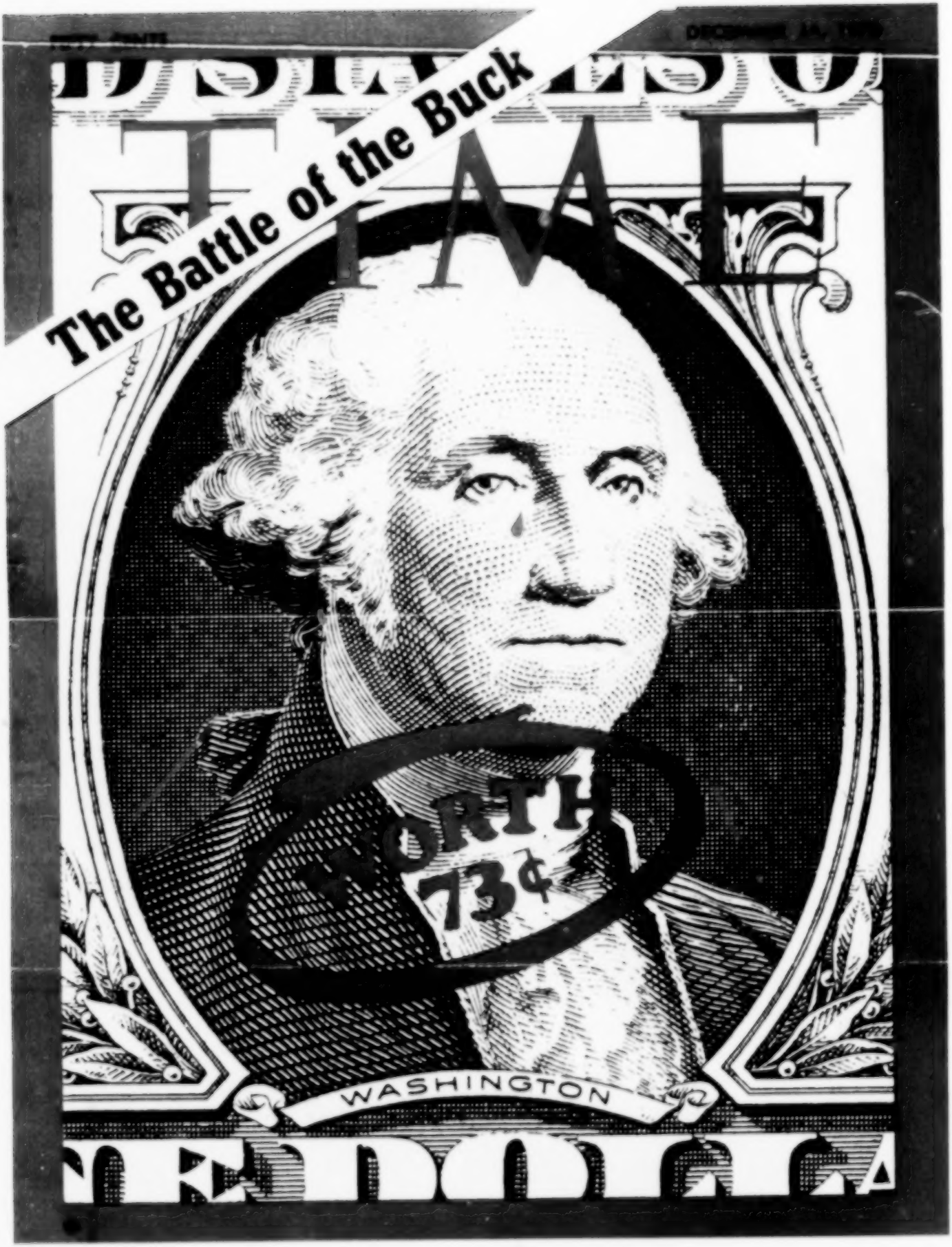
(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term "postage stamp" includes postage meter stamps.


TIME
The Battle of the Buck
WORTH
73¢
WASHINGTON

How to Mobilize Against Inflation

Inflation may be becoming to the 1970s what depression was to the 1930s—not only an economic agony but a crisis that threatens the stability of society. Like the Great Depression four decades ago, today's Great Inflation has struck a blow at Americans' usual optimism about the future and replaced it with a deep worry—about whether families will be able to afford travel, comfortable housing, quality education for their children, even the foods they like best.

Millions of people justifiably feel that the economy is cheating them of the rewards of hard work and thrift. A few more years of skyrocketing prices that wipe out much of the middle class and reduce some Americans to eating dog food could well cause many voters to question whether a system so fundamentally flawed can endure.

The public demoralization is being vastly increased by a gnawing fear that no one knows how to stop inflation in a modern democratic capitalist economy. The Government swings erratically from price controls to a free market, from budget stimulation to budget cutting, from easy money to tight money; nothing seems to work for long. Economists discussing anti-inflation strategy have rarely been so modest and tentative; several seem confident only in proclaiming that their colleagues' ideas will not work.

Modesty is advisable: inflation is in fact the most torturingly complex problem of modern economics. It seems inextricably bound up with growth and high employment; a quick and sure solution might be achieved by inducing another depression—but that would be too severe a cure. Moreover, inflation has become a worldwide plague (TIME cover, April 8). The U.S., even if it can control the economic sickness within its own borders, might be subject to reinfection from abroad.

But if no quick, final cure is in sight, the Government still has an obligation to act. The economy, to be sure, is not completely manageable by Washington, but there are a number of policy actions that could be taken to greatly reduce inflation's severity. And in dealing with inflation, degree is crucial; the difference between price increases at annual rates of, say, 6% and 12% is the difference between excessive social drinking and incapacitating alcoholism.

The steps are slow-working and painful. Worse, they sound like a prescription for ensuring the defeat of any President who tries them, since they amount to taking on every vested interest in the economy at once. So there will be a strong temptation to avoid them and hope that a recent downturn in inflation—from an annual rate of 12.3% in the first quarter to 8.8% in the second—continues on its own. But that improvement is scarcely satisfactory; the Government must do all it can to bring the rate down further.

The first essential is to hold down federal spending and reduce the rate of increase in the U.S. money supply. That classic remedy for inflation has been advocated so often that Administration officials refer to it as "the old-time religion." It means slow growth, sluggish profits, distressing unemployment. So it is not surprising that the old-time religion has been more often preached than followed.

Right now, the Federal Reserve Board is acting the role of zealous convert. In 1972 and early 1973 it pumped out enough money to overstimulate a booming economy; money supply in the last quarter of 1972 grew at a startling annual rate of 8.4%. Lately the board has held the increase to a rate of about 6%, a growth much slower than the explosive—and inflationary—surge in demand for business loans. Interest rates have consequently gone into orbit. But as Alan Greenspan, who is Nixon's choice to become head of the Council of Economic Advisers, has pointed out, that policy has been pushed close to the point at which it will self-destruct. Savings and loan associations and savings banks cannot effectively compete with commercial banks for funds in the tight money market, and some may soon teeter on the edge of collapse. If so, the Federal Reserve would have to come to their rescue as "lender of last resort"—and that would mean another massive, inflationary increase in the money supply. The Federal Reserve, in other words, cannot fight inflation all by itself; it needs help from Administration budget makers—who, while preaching fiscal conservatism, have run up a cumulative deficit of $68 billion in five years.

Federal Reserve Chairman Arthur Burns called last week for a $10 billion cut in Government spending for fiscal 1975, which is budgeted at $305 billion, v. $270 billion in the last fiscal year. President Nixon himself has said that expenditures should be held to $300 billion, at which point they might just be balanced by growing revenues, but he has postponed the hard decisions about where to cut. Small wonder. The choice will have to be made from a herd of sacred cows: military spending, veterans' benefits, revenue-sharing aid to states and cities.

The size and specifics of any cut in this year's budget are less important than that the Administration, the Federal Reserve and Congress all determine to apply fiscal-monetary restraint for as long as is necessary. The policy need not be pressed hard enough to cause a recession. Rather, the strategy should be to permit some real growth, but keep the budget and monetary brakes on hard enough to hold total demand for several years slightly below the economy's capacity to increase the output of goods and services, until the inflationary momentum at last subsides.

Such a hold-down would set up severe strains in the economy, which the Government must be prepared to ease. For one thing, credit would remain scarce and costly, especially for small businessmen and home buyers. To prevent big corporations from gobbling up all the loan money, the Government would have to nag bankers to turn down some loans and perhaps institute credit controls if they refused.

A long-term program of holding down demand would mean that for years the nation could not reduce the jobless rate to the 4% "full employment" level; unemployment might well rise beyond the present 5.2%. The unemployed, of course,

TIME
THE BIG PAYOFF
Lockheed Scandal:
Graft Around the Globe

$1.00 NOVEMBER 1, 1976

TIME

Are Things as Good as Ford Says?

Or as Bad as Carter Says?

VOTING YOUR POCKETBOOK

FORTUNE

$2.00 February 12, 1979

AMERICA'S INVISIBLE RICH

Taiwan's Future

The Nightmare of Natural-Gas Decontrol

Cadillac's Super-Salesman

Sports Illustrated
FEBRUARY 16, 1981 $1.50

ANATOMY OF A SCANDAL

The Mastermind's Inside Story of the Boston College Point-Shaving Scheme

Use Of Illustrations Of Obligations & Securities Of The United States & Foreign Governments

Department Of The Treasury

United States Secret Service

The Department of the Treasury sponsored legislation to liberalize and clarify laws relating to the use of illustrations and films of paper money, postage and revenue stamps, checks, bonds and other obligations of the United States and foreign governments. This legislation was passed by Congress on September 2, 1958 (Public Law 85-921) and was further amended on June 20, 1968, to permit reproductions of postage stamps in color under certain conditions (Public Law 90-353).

As the Federal enforcement agency charged with safeguarding our Nation's currency, the United States Secret Service believes that any permission to photograph and reproduce pictures of money, in color, would seriously weaken the safeguards designed to protect our currency.

As an aid to those interested in the use of such illustrations and films, this leaflet sets forth pertinent information as to the conditions under which it is permissible to print illustrations and to make films of United States and foreign obligations and securities.

PAPER MONEY, CHECKS, BONDS, ETC.

Printed illustrations of paper money, checks, bonds and other obligations and securities of the United States and foreign governments are permissible for numismatic, educational, historical and newsworthy purposes, and for numismatic or philatelic advertising but not for general advertising purposes. Illustrations must be in black and white and must be less than three-fourths or more than one and one-half times the size of the genuine instrument. No individual facsimiles of such obligations are permitted, and no illustrations of paper money, checks or bonds may be in color.

To be permissible, an illustration must be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Illustrations used primarily for decorative or eye-catching purposes are not permissible.

Motion-picture films, microfilms and slides of paper money, checks, bonds and other obligations and securities of the United States and foreign governments are permitted in black and white or in color for projection upon a screen or for use in telecasting. They may not be used for advertising purposes, except philatelic or numismatic advertising.

ADVERTISING

Printed illustrations or films of paper money, checks or bonds are not permitted in connection with advertising. However, printed illustrations of paper money, but not films, may be used in connection with numismatic advertising. Also, Treasury regulations permit the illustration of United States bonds in connection with a campaign for the sale of such bonds.

UNITED STATES AND FOREIGN POSTAGE STAMPS

Printed illustrations of canceled and uncanceled United States postage stamps are permissible for articles, books, journals, newspapers or albums for philatelic, educational, historical and newsworthy purposes.

"less than 3/4 or more
than 1 1/2 times"
THE UNITED STATES OF AMERICA
ONE DOLLAR

Black and white illustrations may be of any size. Colored illustrations of canceled United States postage stamps may be of any size. However, illustrations in color of uncanceled United States postage stamps must be less than three-fourths or more than one and one-half times the size of the genuine stamp.

Printed illustrations of canceled foreign stamps in black and white or color, are permissible in any size and for any purpose.

Black and white and color illustrations of uncanceled foreign postage stamps are permitted for philatelic, educational, historical and newsworthy purposes. Black and white illustrations may be of any size, but color illustrations must be less than three-fourths or more than one and one-half times the size of the genuine stamp.

Motion-picture films and slides of United States and foreign postage stamps are permissible in black and white or in color for projection upon a screen or for use in telecasting. They are not permissible for advertising purposes except for philatelic advertising.

PHILATELIC ADVERTISING

Black and white illustrations of canceled and uncanceled United States and foreign postage stamps, as well as colored illustrations of canceled postage stamps are permissible in any size, for philatelic advertising. Uncanceled colored illustrations of United States and foreign postage stamps are permitted for philatelic advertising, but must meet the three-fourths or one and one-half size restrictions.

Note: Canceled U. S. and foreign postage stamps must bear an official cancellation mark, i.e., the stamps must have been used for postage.

REVENUE STAMPS

Regulations for printed illustrations of United States and foreign revenue stamps are the same as for postage stamps, except that colored illustrations of United States revenue stamps are not permitted.

DESTRUCTION OF PLATES AND NEGATIVES

The plates and negatives, including glossy prints, of any United States or foreign obligations produced for any of the above purposes, must be destroyed after their final use for the purpose for which they were made.

COINS

Photographs or printed illustrations, motion-picture film or slides of United States and foreign coins may be used for any purpose including advertising.

With few exceptions, existing law generally prohibits the manufacture, sale or use of any token, disk or device in the likeness or similitude of any coins of the United States or of any foreign country which are issued as money.

"canceled stamps may
be in color &
in any size"
8¢
ENHOWER U.S.A.

EXCERPTS FROM APPLICABLE STATUTES

TITLE 18, U.S. CODE, SECTION 8

"The term 'obligation or other security of the United States' includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps."

TITLE 18, U.S. CODE, SECTION 481

"Whoever, except by lawful authority, prints, protographs, or makes, executes, or sells any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or whoever brings into the United States any counterfeit plate, stone, or other thing, engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation shall be fined not more than $5,000 or imprisoned not more than five years, or both."

TITLE 18, U.S. CODE, SECTION 15

"The term 'obligation or other security of any foreign government' includes, but is not limited to, uncanceled stamps, whether or not demonetized."

TITLE 18, U.S. CODE, SECTION 504

"Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negative and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term 'postage stamp' includes postage meter stamps."

TITLE 18, U.S. CODE, SECTION 474

"Whoever prints, photographs, or in any other manner makes

or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security (of the United States), or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; • • • shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

TITLE 18, U.S. CODE, SECTION 475

"Whoever designs, engraves, prints, makes, or executes, or utters, issues, distributes, circulates, or uses any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any obligation or security of the United States issued under or authorized by any Act of Congress or writes, prints, or otherwise impresses upon or attaches to any such instrument, obligation, or security, or any coin of the United States, any business or professional card, notice, or advertisement, or any notice or advertisement whatever, shall be fined not more than $500."

TITLE 18, U.S. CODE, SECTION 489

"Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money, either under the authority of the United States or under the authority of any foreign government shall be fined not more than $100."

In God we

Office - Supreme Court, U.S.
FILED
FEB 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-729

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANTS

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Solicitor General
Department of Justice
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(202) 633-2217

TABLE OF AUTHORITIES

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DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANTS

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1. The district court in this case has declared unconstitutional a federal statutory scheme that places certain restrictions on the reproduction of photographs of United States currency. Appellee argues (Mot. to Aff. 19) that the judgment below should be affirmed summarily because it is "so plainly correct, and so manifestly compelled by the prior rulings of this Court * * *." Appellee, however, fails to cite a single decision by this Court that is directly in point; rather, it argues by analogy, relying on a number of cases involving different statutes that regulated different types of expressive conduct. In fact, the statutory scheme at issue here was *upheld* by the only other courts to have considered its constitutionality. See *Wagner* v. *Simon*, 534 F.2d 833 (8th Cir. 1976), aff'g 412 F. Supp. 426 (W.D. Mo. 1974). The conflict between the decision below and that of the Eighth Circuit in *Wagner* v. *Simon* is itself a sufficient reason for this Court to note probable jurisdiction.

Moreover, there is no dispute in this case that the Constitution grants Congress broad powers to protect the integrity of our Nation's currency. Appellee concedes that Congress may, without running afoul of the First Amendment, exercise these powers by placing some restrictions on the reproduction of photographs of United States currency (*e.g.*, by prohibiting counterfeiting). At the same time, we agree with appellee that the statutes at issue—18 U.S.C. 474 para. 6 and 18 U.S.C. 504—may have the effect of restricting the publication of some photographs of currency that have little capacity to deceive or defraud. But the point that appellee ignores is that in enacting these statutes Congress sought to strike a balance between legitimate First Amendment concerns and legitimate law enforcement concerns by permitting reproduction of photographs of currency for expressive purposes so long as certain reasonable conditions—designed to protect against fraudulent use of those photographs—are satisfied. That congressional judgment is entitled to considerable respect. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). Given the unquestionably substantial governmental concerns addressed in the statutory scheme, the deference due to Congress' judgment (particularly where it conscientiously has attempted to accommodate legitimate constitutional concerns), and the absence of controlling authority that squarely supports the decision below, we submit that this case warrants plenary review by this Court.

2. The main thrust of appellee's argument is that Section 474 para. 6 and Section 504 bear no substantial relation to the statutory goal because they prohibit publication of some photographs of currency that could not successfully be used to deceive. Appellee suggests (Mot. to Aff. 29) that "[t]he solution to the problem presented in this case" is to hold unconstitutional a federal statute that has been in

existence for more than a century, because "Congress plainly knows how to write" a new statute that would avoid the constitutional problems that appellee perceives. Appellee points to several unenacted legislative proposals that would punish the making, uttering or possession of a counterfeit written instrument with intent to deceive or defraud another person or a government (Mot. to Aff. 29-30 n.19).

If appellee is correct that Congress may not constitutionally punish those who publish photographs of United States currency unless it can show an intent to deceive or defraud, then the government would be powerless to prevent appellee or any other publisher from printing full size, full color reproductions of $100 bills, so long as the publisher could validly claim that the reproductions "constitute important editorial material" (Mot. to Aff. 24) protected by the First Amendment. While a publisher may have a perfectly legitimate editorial purpose for reproducing an exact or substantially identical copy of United States currency and may in truth lack any intent to deceive or defraud, individual purchasers of publications containing the facsimiles might not share that innocent intent and might seek to pass the facsimiles to others. The statutory scheme at issue here is designed to safeguard against precisely this sort of situation, which carries the potential for widespread deception and fraud. Although the government could, under the proposed statutes, proceed against any individual caught passing the facsimiles as real currency, it would be difficult, if not impossible, to enforce such a statute in an effective manner.

3. Appellee contends that the statutory scheme "directly and dramatically abridges the freedom to communicate" and "significantly restricts the editorial content of Time's magazines" (Mot. to Aff. 10, 21). Under the statutory scheme, however, appellee is free to publish photographs of

United States currency in its magazines so long as those photographs are in compliance with the reasonable color and size requirements of 18 U.S.C. 504. Thus, it is absurd to argue that freedom of expression is meaningfully restricted by the statutes at issue here. Appellee's grossly exaggerated contentions reflect an extreme approach that, if accepted, would result in the trivialization of the First Amendment and the important values it embodies. This Court should reject appellee's extreme approach and should grant plenary review to consider the substantial constitutional question presented by this case.

For the foregoing reasons and those stated in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

FEBRUARY 1983

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CLERK

No. 82-729

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504, which restrict the printing or photographing of illustrations of United States currency and other obligations and securities of the United States, violate the First Amendment.
2. Whether 18 U.S.C. 504 is unconstitutionally vague.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following individuals were defendants in the district court and are appellants in this Court: H. Stuart Knight, Director, United States Secret Service; William French Smith, Attorney General of the United States; James R. D'Amelio, Special Agent in Charge, New York Field Office, United States Secret Service; and John P. Martin, Jr., United States Attorney for the Southern District of New York.

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18 U.S.C. 1546 20
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W. Bowen & H. Neal, *The United States Secret Service* (1960) 35
Department of the Treasury, United States Secret Service, *Annual Statistical Summary FY 82* (1982) 21
The Federalist No. 42 (E. Rhys ed. 1942) 4
H.R. 4275, 97th Cong., 1st Sess. (1981) 30
H.R. Rep. No. 1709, 85th Cong., 2d Sess. (1958) 9, 28
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S. Rep. No. 10 (Pt. 1), 60th Cong., 1st Sess. (1909) 7
S. Rep. No. 2446, 85th Cong., 2d Sess. (1958) 9, 28
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In the Supreme Court of the United States

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No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.A. 117-153) is reported at 539 F. Supp. 1371.

JURISDICTION

The judgment of the district court (J.A. 155-156) declaring 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 unconstitutional was entered on June 18, 1982. A notice of appeal (J.S. App. 36a-37a) was filed on July 16, 1982. Justice Marshall extended the time for docketing the appeal to and including October 27, 1982. The appeal was docketed on that date, and probable jurisdiction was noted on February 22, 1983 (J.A. 157). The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

3. 18 U.S.C. 474 ¶ 6 provides in pertinent part:

> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any * * * obligation or other security [of the United States] or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

4. 18 U.S.C. 504 provides:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation
>
> for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions

of the section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncancelled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of cancelled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purpose of this section the term "postage stamp" includes postage meter stamps.

STATEMENT

A. The Statutory Background

The Constitution expressly authorizes Congress to "coin Money [and] regulate the Value thereof" (Art. I, § 8, Cl. 5) and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (Art. I, § 8, Cl. 6).[1] Pursuant to this authority, Congress, in Chapter 25 of the Criminal Code, 18 U.S.C. 471 *et seq.*, has enacted a comprehensive scheme to define and punish offenses involving the forgery or counterfeiting of the currency and other official obligations of the United States. The statutory scheme punishes the making, uttering, or dealing in counterfeit United States obligations or securities (18 U.S.C. 471, 472, 473); taking impressions of tools used to print United States obligations or securities, or possessing or selling such impressions (18 U.S.C. 476, 477); possessing, using, or selling materials (such as plates, stones and paper) that can be used for counterfeiting purposes (18 U.S.C. 474 ¶¶ 1-5, 7); and using imitations of United States obligations or securities for advertising purposes (18 U.S.C. 475).

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[1] In contrast to the Articles of Confederation, which only empowered the federal government to regulate "the alloy and value of coin struck by their own authority or by that of the respective States" (Articles of Confederation, Art. IX), the Constitution gives the federal government a monopoly on coinage by expressly prohibiting the states from coining money (Art. I, § 10, Cl. 3). The constitutional grant to Congress of exclusive authority to coin money and punish counterfeiting was a response to numerous problems over commerce and coinage under the Articles of Confederation. See A. Sutherland, *Constitutionalism in America* 162-166 (1965). James Madison stated that these constitutional provisions "supplied a material omission in the [A]rticles of Confederation." *The Federalist* No. 42, at 216 (E. Rhys ed. 1942). In 1792, Congress exercised its exclusive authority over coinage by establishing a mint and creating a standard of notation that defined the dollar unit and introduced the decimal pattern of calculation. Act of Apr. 2, 1792, ch. 16, 1 Stat. 246 *et seq.*

In addition to the foregoing provisions, Chapter 25 contains the two statutes at issue in this case. The first statute, 18 U.S.C. 474 ¶ 6, broadly prohibits printing, photographing, or making any impression in the likeness of any obligation or other security of the United States.[2] The second statute, 18 U.S.C. 504(1), creates certain exceptions to the broad prohibition in Section 474 ¶ 6. Section 504(1) permits the printing or publishing of illustrations of United States obligations and securities "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums," provided that the illustrations are in black and white and are of a size less than three-quarters or more than one-and-one-half of the genuine article, and provided further that the negatives and plates used in making the illustrations are destroyed after their final use.

1. 18 U.S.C. 474 ¶ 6

Section 474 ¶ 6 punishes any person who in any manner makes or executes "any engraving, photograph, print, or impression in the likeness of any * * * obligation or other security [of the United States] * * *." Unlike most of the other provisions in Chapter 25, Section 474 ¶ 6 does not require a showing of specific intent to defraud, and the courts have consistently interpreted this provision as prohibiting reproductions of United States currency without regard to whether the reproductions are

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[2] The term "obligation or other security of the United States" is defined in 18 U.S.C. 8 as including

> all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

either accurate likenesses of genuine obligations, or are intended to or are capable of deceiving the public.[3] Section 474 ¶ 6 thus reflects Congress' determination to permit no unauthorized reproductions of United States currency.

Section 474 ¶ 6 dates from the period of the War Between the States (see J.A. 122-123). Earlier, in 1790, Congress enacted the Nation's first anti-counterfeiting statute, which made it a crime to counterfeit or utter certificates, indents, or other public securities of the United States. Act of Apr. 30, 1790, ch. 9, Section 14, 1 Stat. 115. In 1837, Congress authorized the issuance of a theretofore unprecedented amount of Treasury notes and expanded the scope of the anti-counterfeiting laws by punishing the possession of any plate, bank note, or paper adapted for counterfeiting purposes. Act of Oct. 12, 1837, ch. 2, Sections 10, 11, 5 Stat. 203. See *United States* v. *Raynor*, 302 U.S. 540, 543-544 (1938). Between 1860 and 1864, Congress authorized great increases in government obligations, a development that stimulated counterfeiting and increased the need to enact stricter legislation to deal with the problem. See *id.* at 544-545. In 1862, Congress first made it a crime to "print, photograph, or in any other manner execute" an impression "in the likeness or similitude of any [United States] notes, bonds or coupons, or other securities * * *." Act of Feb. 25, 1862, ch. 33, Sections 6, 7, 12 Stat. 348. Two years later, Congress broadened the prohibition to include the making of prints or photographs "in the likeness or similitude of any obligation or other security" of the United States. Act of June 30, 1864, ch. 172, Sec-

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[3] See *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954); *Wholesale Vendors of Texas, Inc.* v. *United States*, 361 F. Supp. 1045, 1047-1048 (N.D. Tex.), aff'd, 486 F.2d 1402 (5th Cir. 1973); cf. *Koran* v. *United States*, 408 F.2d 1321, 1325 n.12 (5th Cir. 1969), cert. denied, 402 U.S. 948 (1971).

tion 11, 13 Stat. 221-222.[4] The statute has continued, in substantially the same form, until today.[5]

2. 18 U.S.C. 504(1)

Section 504, which provides certain exceptions to the flat ban of Section 474 ¶ 6, was enacted in 1958. The purpose of this statute was explained in identical language in the House and Senate Committee Reports:

> Title 18, United States Code, section 474, as previously stated, prohibits making any photograph, engraving, print, or impression in the likeness of any obligation or security. * * *
>
> The Treasury Department receives numerous requests for special permission to use illustrations of paper money and other obligations and securities of the United States for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example, in school textbooks. Collectors of old paper money likewise wish to use illustrations of such money in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money

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[4] Section 11 of the 1864 Act is set forth in the district court's opinion (J.A. 122-123). Section 13 of that Act (13 Stat. 222) defined "obligation or other security" as including "all bonds, coupons, national currency, United States notes, treasury notes, fractional notes * * * of whatever denomination, which have been or may be issued under any Act of Congress."

[5] The statute was reenacted, with few changes, as Section 5430 of the Revised Statutes of 1878, and again as Section 150 of the codification of 1909. Act of Mar. 4, 1909, ch. 319, 35 Stat. 1116. At that time, a Special Joint Congressional Committee on Revision of the Laws noted:

> This section [what is now 18 U.S.C. 474] is broadened as to embrace every method which may be employed in counterfeiting the obligations of the United States * * *.

S. Rep. No. 10 (Pt. 1), 60th Cong., 1st Sess. 19 (1909). The statute was amended again in 1923 to authorize certain illustrations of postage and revenue stamps. Act of Mar. 3, 1923, ch. 218, 42 Stat. 1437.

to picture currency in circulation during a particular historical period. Newspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations.

The Secretary of the Treasury, under the authority vested in him by title 18, United States Code, section 474, has normally as a matter of practice for many years made exceptions to the statute by granting special permission to use illustrations of United States bonds and paper money for numismatic, historical, and educational purposes. To prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money.

It is the opinion of the Treasury Department that the printing in publications of black-and-white illustrations of paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting. Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired. A provision is included to require that the negatives and plates used in making the illustrations shall be destroyed after their final use for the purpose for which they were made. Such a requirement has formerly been imposed in cases where the Secretary of the Treasury has granted special permission as a precautionary measure and to avoid investigations of alleged violation where plates and negatives were legitimately made but were merely discarded instead of being destroyed.

The instant legislation will not permit the printing of facsimiles in the likeness of paper money or

> other obligations, but would limit reproductions to illustrations in publications. * * *

S. Rep. No. 2446, 85th Cong., 2d Sess. 5-6 (1958); H.R. Rep. No. 1709, 85th Cong., 2d Sess. 3-4 (1958).

Thus, as the district court noted (J.A. 125), in Section 504(1) Congress codified the Secretary of the Treasury's practice of permitting illustrations of United States currency to be used for numismatic, historical and educational purposes. In order to prevent fraud and counterfeiting, the statute imposes certain minimal requirements: illustrations must be in black and white and must be of a certain size, and negatives and plates used to make such illustrations must be destroyed. Finally, Congress emphasized that Section 504(1) limits reproductions to illustrations in publications and does not permit the printing of facsimiles.[6]

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[6] 18 U.S.C. 504(2) permits the use of United States obligations and securities in motion-picture films, microfilms or slides for projection on a screen and in telecasting. The Committee reports explained:

> The use of films by individuals and by private industry for various purposes has expanded steadily over the years and the Treasury Department perceives no difficulty, from the standpoint of preventing counterfeiting, in permitting the making of motion-picture films, micro-films, or slides of various obligations and securities of the United States and foreign governments. Paragraph (2) of section 504, as it would be amended by the bill, would provide statutory authority for making such films. The counterfeiter does not use a motion-picture film, microfilm, or slide in the preparation of counterfeits and it is felt that to permit such films would not facilitate counterfeiting. As a precaution, however, a provision is included to the effect that no prints or enlargements could be made from the films without special permission of the Secretary of the Treasury.

S. Rep. No. 2446, *supra*, at 7; H.R. Rep. No. 1709, *supra*, at 5.

Section 504(2) does provide that films, microfilms or slides showing United States currency may not be made for advertising purposes (except philatelic advertising). Section 504(1) has a similar provision. In addition, 18 U.S.C. 475 independently prohibits the making or distribution of any advertisement "in the likeness or

B. The Proceedings Below

1. Appellee Time, Inc., a corporation engaged in the business of publishing magazines, brought this action for declaratory and injunctive relief in the United States District Court for the Southern District of New York, challenging the constitutionality of 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504(1) on their face and as applied (J.A. 3-12).[7] Appellee alleged that, on at least six occasions within the preceding decade, representatives of the Secret Service had advised appellee that particular photographic reproductions of United States currency that appeared in appellee's magazines were in violation of the color and size requirements of Section 504(1) (J.A. 10, 30-35). Appellee further alleged that the Secret Service had requested it to cease and desist from further violations and had warned, in November 1976, that further violations would be referred to the United States Attorney's Office "for appropriate action" (J.A. 34-35).[8]

Appellee asserted that, "[i]n the editorial judgment of [its] editors and art directors," illustrations of currency are an effective means of communicating ideas about a wide range of issues of public interest and "[f]reedom to use such illustrations is important to the journalists responsible for the selection and preparation of the editorial content of [appellee's] magazines" (J.A.

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similitude" of any United States obligation or security. Appellee has not challenged the restrictions imposed upon advertisers, and thus these provisions are not at issue in this case.

[7] The complaint named as defendants certain government officials responsible for administering and enforcing the federal anti-counterfeiting laws, including the Secretary of the Treasury, the Attorney General, the Director of the Secret Service, the United States Attorney for the Southern District of New York and the Special Agent in Charge of the Secret Service's New York Field Office (J.A. 4-5).

[8] Although the Secret Service subsequently brought additional alleged violations to appellee's attention, none of these matters was formally referred to the United States Attorney's Office for prosecution.

5).[9] Appellee contended that Section 474 ¶ 6 and 504(1) violate the First Amendment because they prohibit the publication of illustrations of currency that pose no danger to the government's interest in preventing counterfeiting, and because Section 504(1) impermissibly distinguishes lawful from unlawful speech on the basis of content. In addition, appellee claimed that Section 504(1) is unconstitutionally vague (J.A. 10-11).[10]

2. On cross-motions for summary judgment, the district court entered a declaratory judgment for appellee, holding that 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504 are unconstitutional on their face and as applied to appellee (J.A. 117-153, 155-156).[11] The court first concluded that

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[9] Appellee submitted affidavits by editors and art directors of several of its magazines to explain the journalistic value of color illustrations of currency (J.A. 71-103). The affidavits stated that appellee's magazines increasingly have relied on color photographs to accompany their texts (J.A. 77, 91-92) and that, because the statutes at issue prohibit color depictions of currency, they amount to "government censorship" (J.A. 93) and "severely restrict [appellee's] ability to communicate on issues of great contemporary importance" (J.A. 79). The affidavits alleged that the ban on color illustrations of currency is not a rational means of preventing counterfeiting because technological advances have made it unnecessary for a would-be counterfeiter to resort to copying illustrations of currency in appellee's magazines, and because the illustrations published by appellee generally involved distorted representations of currency in the wrong size, color and shape (J.A. 76, 89, 92, 98-99).

[10] Appellee stated that it has no objection to the requirement in Section 504(1) that materials used to print illustrations of currency be destroyed after their final use (J.A. 76-77).

[11] The district court rejected the argument that appellee's challenge to the constitutionality of the statutes did not present a justiciable controversy sufficient to support federal court jurisdiction under Article III (J.A. 133-137). The court noted that over a ten year period the Secret Service had issued warnings to appellee that appellee's illustrations were in violation of the statutes, and it observed that federal officials had "never disavowed the possibility of prosecution" (J.A. 136-137). In these circumstances, the court concluded that even though appellee had not actually been prosecuted under

appellee's publication of illustrations of United States currency is protected speech because it is "intimately related to the expression and communication of ideas" and "does not entail expression which is deemed by the nature of its content to be subject to regulation in the interests of the public weal" (J.A. 138-139).

Focusing on Section 474 ¶6, the district court ruled that, although "[t]he government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's currency system" (J.A. 145-146), the comprehensive ban on reproducing likenesses of United States currency constitutes overbroad subject matter regulation that interferes unduly with protected speech because it includes within its prohibition illustrations of currency "that have no utility for fraud or forgery and that cannot be used for counterfeiting" (J.A. 146). The court concluded (*ibid.*), without elaboration, that "[t]here are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse." In addition, the district court rejected the argument that the prohibition in Section 474 ¶ 6 could be justified on the ground that it protects " 'the value [of] and respect for instruments issued as the official obligations of the United States' " (J.A. 145). The court viewed this justification as banning "the use of illustrations of money because of the ideas such illustrations may symbolically represent" (J.A. 146-147), and concluded that the justification was impermissible because "[t]he government cannot compel or prohibit respect for any symbol or idea in this country" (J.A. 147).

The district court then turned to Section 504(1), which it interpreted as excepting from the broad prohibition in Section 474 ¶ 6 black and white illustrations that meet certain size specifications only if those illustrations appear in articles, books, journals, newspapers or albums for

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the statutes, the controversy was sufficiently concrete to satisfy the requirements of Article III.

philatelic, numismatic, educational, historical, or newsworthy purposes (J.A. 149). The court determined that this statute effects a "time, place and manner" regulation that is impermissibly content-based because "[n]either the purpose to which an illustration is put nor the forum in which it appears has any relation to the prevention of counterfeiting" (J.A. 150). In addition, the court held Section 504(1) impermissibly vague because, it found, an individual would have difficulty determining what is a journal, newspaper or album, and what purposes are philatelic, numismatic, educational, historical, or newsworthy (J.A. 151-152).[12]

SUMMARY OF ARGUMENT

Section 474 ¶ 6 and 504(1) are presumptively valid Acts of Congress, plainly authorized by the powers delegated in Article I, Section 8 of the Constitution to coin money, regulate the currency and punish counterfeiting, and to make all laws "necessary and proper" for those purposes. The district court erred in concluding that these statutes are unconstitutional. The statutes do not significantly restrict First Amendment rights and are necessary to further the government's compelling interest in protecting the integrity of the Nation's currency system.

A. Contrary to appellee's contentions, Section 474 ¶ 6, which prohibits the reproduction of photographs of United States currency, does not meaningfully abridge appellee's freedom to communicate on any subject. The statute is directed only at the use of illustrations of United States currency, not at the substance of any message appellee wishes to convey.

Moreover, the minimal limitation on expression contained in Section 474 ¶ 6 is justified by the government's compelling interest in preserving the integrity of its cur-

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[12] In light of its entry of a declaratory judgment holding Sections 474 ¶ 6 and 504 unconstitutional, the district court concluded that there was no need to enjoin appellants from enforcing the statutes (J.A. 153 n.24).

rency system. That interest includes not only the need to punish and deter counterfeiters, which both the district court and appellee recognize as a legitimate governmental objective, but also the need to detect and investigate counterfeiting activity, which by its nature is carried out surreptitiously. Because the process of printing, photographing, or making an impression of United States currency for legitimate expressive purposes is virtually indistinguishable from the processes involved in counterfeiting currency, the prohibition in Section 474 ¶ 6 enables the Secret Service to trace and identify the sources of counterfeit bills.

In addition, the government's interest in preserving the integrity of its currency system extends beyond a concern with counterfeiting. Like laws that regulate the uses of the flag, Section 474 ¶ 6 may properly be viewed as a restriction on the uses to which the government's "property" may be put. See *Smith* v. *Goguen*, 415 U.S. 566, 586-587 (1974) (White, J., concurring in the judgment). The design and appearance of United States obligations and securities are as much the "property" of the government—and are equally subject to reasonable restrictions on expression designed to protect their integrity—as were the military base in *Greer* v. *Spock*, 424 U.S. 828 (1976), the transit system vehicles in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), or the letterboxes in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981). The district court erred in concluding that this was an impermissible justification because it, in effect, would require publishers to pay "respect" to the government's symbol. Section 474 ¶ 6 does not require anyone to respect United States currency, or ban the use of illustrations of currency because of the ideas those illustrations may represent. Rather, the statute simply prohibits the printing or photographing of currency, without regard to the message sought to be conveyed.

B. Section 504(1) permits publishers to include illustrations of United States currency in publications,

provided that the illustrations are in black and white and are of a certain size, and provided further that the plates or negatives used in making the illustrations are destroyed. These limitations also are not directed at the idea that an illustration of currency is intended to convey, but merely affect the manner in which an illustration of a dollar bill may be presented. Thus, Section 504(1) may be upheld as a content-neutral time, place and manner regulation.

The district court concluded, however, that Section 504(1) is not a proper time, place and manner regulation because, in permitting the publication of illustrations of United States currency for "philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers or albums," the statute regulates speech on the basis of content. The court also found that the "forum" and "purpose" provisions are invalid because there is an insufficient nexus between the distinctions among the various purposes and forums and the goal of preventing fraud and counterfeiting. In addition, the court concluded that the 'purpose" and "forum" provisions are impermissibly vague.

The district court erred in striking down the statute without attempting to interpret it more narrowly in order to alleviate the constitutional problems it discerned. In Section 504(1), Congress merely sought to codify the Department of the Treasury's informal practice of permitting publishers of books, journals and newspapers to use illustrations of currency for numismatic, historical, educational, or newsworthy purposes. Thus, the statutory references to these "purposes" and "forums" may be construed as illustrative rather than mandatory. So construed, the statute does not suffer from any of the constitutional defects that the district court perceived.

Contrary to appellee's view, the statutory prohibition of color illustrations of currency is not "irrational." In effect, appellee is seeking to elevate its editors' aesthetic preference for color illustrations of currency to a constitutionally protected "right" to freedom of expression.

Congress reasonably concluded, however, based on the recommendations of the Department of the Treasury, that this limitation (as well as the limitations as to size and disposition of negatives and plates) was necessary to protect against counterfeiting and fraud. The fact that technological advances in color reproduction have caused magazine publishers like appellee to rely to an increasingly greater extent on color photographs does not justify the conclusion that the statute is constitutionally infirm. Indeed, these advances in technology have also helped to facilitate the work of counterfeiters while making detection and enforcement more difficult.

Finally, if this Court were to conclude that Section 504(1) cannot be saved by judicial construction, it should sever the two statutes and invalidate Section 504(1) while leaving intact Section 474 ¶ 6, which was enacted nearly a century earlier.

ARGUMENT

18 U.S.C. 474 ¶ 6 AND 18 U.S.C. 504(1) ARE CONSTITUTIONAL BECAUSE THEY ARE REASONABLE MEASURES DESIGNED TO SAFEGUARD THE NATION'S CURRENCY SYSTEM AGAINST COUNTERFEITING

A. Introduction

The Framers of the Constitution recognized that the power to establish a monetary system is an essential attribute of national sovereignty. A concomitant of that power is the authority to preserve and maintain the integrity of the Nation's monetary system. See *United States* v. *Marigold*, 50 U.S. (9 How.) 560 (1850). As this Court has recognized, "currency measures all values and is the medium, directly or indirectly, of all exchanges. To keep it sound, and to guard it as far as possible from fluctuation, are among the most imperative duties and among the most difficult problems of government." *Davidson* v. *Lanier*, 71 U.S. (4 Wall.) 447, 454 (1867). Article I, Section 8 of the Constitution accordingly grants to Con-

gress exclusive authority to coin money, regulate the value of currency and punish counterfeiting, and to "make all Laws which shall be necessary and proper" for executing those tasks. Congress has exercised these powers to restrict the reproduction of photographs of United States currency. Neither the district court nor appellee has suggested that 18 U.S.C. 474 ¶ 6 and 18 U.S.C. 504(1) exceed Congress' Article I powers.[13] We begin, then, with two presumptively valid federal statutes—one unchallenged for more than 100 years, the other enacted in recent times to accommodate expressive concerns—both of which are clearly within the powers delegated to the Legislative Branch by the Constitution.

Appellee asserts, however, that the statutory scheme violates its First Amendment right to freedom of expression. This Court has recognized that First Amendment rights are not absolute under all circumstances. They may be circumscribed when necessary to further a sufficiently strong public interest. See, *e.g.*, *New York* v. *Ferber*, No. 81-55 (July 2, 1982); *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); *Pell* v. *Procunier*, 417 U.S. 817 (1974). At the same time, the Court's decisions emphasize that any significant restriction of First Amendment freedoms carries a heavy burden of justification. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972). It is our basic submission that the statutes involved in this case do not significantly restrict First Amendment rights and, in any event, are necessary to further a compelling governmental interest.

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[13] This Court has frequently sanctioned an expansive view of Congress' powers over the monetary system. See *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869) (upholding prohibitory tax on state bank notes); *Knox* v. *Lee*, 79 U.S. (12 Wall.) 457 (1871) (upholding authority of Congress to make paper money legal tender); *Beander* v. *Barnett*, 255 U.S. 224 (1921) and *United States* v. *Raynor*, 302 U.S. 540 (1938) (prohibiting possession of dies and paper similar to those used by the government for printing federal obligations).

In order to appreciate fully the extreme nature of appellee's First Amendment claims, it is necessary to view the statutes in tandem, which is how Congress meant them to operate. Section 474 ¶ 6 absolutely prohibits the printing or photographing of currency, but Section 504(1) creates a broad exception to that prohibition by permitting the use of illustrations of currency in publications so long as the illustrations meet the color and size requirements of the statute and the plates and negative used in printing the illustrations are destroyed. In other words, the statutory scheme merely prohibits a magazine publisher such as appellee from publishing photographs of United States currency in color or in dimensions that approximate the size of the actual currency depicted. These narrow restrictions are not directed at the content of any particular message a publisher may seek to convey by means of the photograph, but instead regulate only the manner or style in which publishers may illustrate United States currency. Under the statutory scheme, therefore, appellee is free to publish photographs of currency in its magazines for expressive purposes, so long as those photographs are in compliance with reasonable limitations designed to serve the government's concededly compelling interest of protecting against counterfeiting.

It is difficult to believe that whatever ideas appellee wishes to communicate by means of illustrations of currency cannot be conveyed by illustrations that comply with the statutory color and size requirements. Thus, when appellee's First Amendment claim is scrutinized closely, it is quite apparent that appellee has no legitimate complaint that the statutes meaningfully curtail its "freedom of expression." Instead, appellee is seeking to elevate its editors' aesthetic preference for color photographs of currency to a constitutionally protected "right".

Appellee's argument boils down to the proposition that the First Amendment guarantees it the right to publish photographs depicting currency in whatever color and size it chooses. In support of this argument appellee asserts that the color and size requirements are unnecessary to

protect against counterfeiting. But the task of selecting the measures necessary to preserve the integrity of our currency system is one that the Constitution has entrusted to Congress, not the courts. Congress, in its wisdom, has decided that the measures it has selected are indeed necessary to protect against counterfeiting. As we show below, the statutory requirements are reasonably related to accomplishing that legitimate purpose. Moreover, to the extent that appellee argues that the lines drawn by Section 504(1) are irrational, appellee appears to raise a question of substantive due process rather than a question of First Amendment law. Regardless of how appellee's arguments may be characterized, however, they are without merit.

In short, despite appellee's grossly exaggerated portrayal of this case as involving "government censorship" of the press (J.A. 93), the statutory scheme represents Congress' effort to strike a reasonable balance between legitimate First Amendment concerns and legitimate law enforcement concerns. Appellee's arguments reflect an extreme approach that, if accepted, would result in the trivialization of the First Amendment and the important values it embodies. Given the presumption in favor of constitutionality, the concededly compelling government interest involved, and the minimal and reasonable restrictions imposed by the statutory scheme, we submit that the district court erred in striking that scheme down.

B. Section 474 ¶ 6 Is Not Impermissibly Overbroad

Instead of considering Section 474 ¶ 6 together with Section 504(1), the statute that was expressly designed to modify it, the district court analyzed Section 474 ¶ 6 in isolation and concluded that it is unconstitutionally overbroad. This was error. In considering the constitutionality of a statute, it is necessary at the outset to determine the statute's scope. As in cases involving statutory construction, "a section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369 U.S. 1, 11 (1962). See,

e.g., *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974). Even when viewed standing alone, however, Section 474 ¶ 6 passes constitutional muster.

Section 474 ¶ 6 prohibits the printing, photographing, or making of any impression in the likeness of an obligation or security of the United States.[14] Appellee asserts (Mot. to Aff. 10, 21) that this statute, "[w]hile not 'aimed' at speech, * * * directly and dramatically abridges the freedom to communicate" and "significantly restricts the editorial content of [appellee's] magazines." This extravagant claim is surely incorrect. Section 474 ¶ 6 does not implicate the central concern of the First Amendment, which is the restriction of expression because of the message it conveys. The statute does not inhibit appellee or anyone else from expressing any view on any subject. The statute is directed only at the use of illustrations of United States currency, not at the substance of any message appellee wishes to convey. Thus, this is not a situation in which the government has arrogated to itself "the choice of permissible subjects for public debate." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980). So long as the minimal requirement of Section 474 ¶ 6 is met, appellee and all others remain free "to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940) (footnote omitted).

Moreover, the minimal limitation on expression contained in Section 474 ¶ 6 is justified by the compelling governmental interest in preserving the integrity of the Nation's currency system. One aspect of that interest is the need to protect against counterfeiting, a concern that

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[14] The prohibition embodied in this statute is similar to prohibitions in other federal criminal statutes relating to photographing or printing immigration or naturalization documents (18 U.S.C. 1426 and 1546), government transportation requests (18 U.S.C. 509), and government identification documents (18 U.S.C. 701).

both appellee and the district court have conceded is compelling. The district court held (J.A. 145-146), however, that by prohibiting *all* illustrations of currency—including illustrations that are not likely to deceive or to assist counterfeiters—the statute is not tailored with sufficient precision to serve that concededly compelling interest.

The district court's analysis is flawed. Section 474 ¶ 6 is designed not only to punish and thereby deter counterfeiting (as are the other provisions of Chapter 25), but also to facilitate the government's efforts at *detecting* and *investigating* counterfeiting activity. Cf. *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 117-118 (1981). By its nature, counterfeiting is a crime that is committed surreptitiously and that depends for its success on the ability of the perpetrators to camouflage their illicit operation. A statute that prohibits the printing of United States currency enables the Secret Service to operate more effectively in tracing and identifying the source of counterfeit bills. The minimal restriction on speech in Section 474 ¶ 6 is certainly a reasonable means for achieving that legitimate goal. If the ban in Section 474 ¶ 6 were eliminated altogether, counterfeiters would more readily be able to conceal their criminal conduct by associating with legitimate print shops, thereby availing themselves of an instant alibi for manufacturing and possessing currency negatives (see J.S. App. 41a-43a).[15]

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[15] This point is supported by recent statistics concerning counterfeiting activity in the United States. The Secret Service has reported that in Fiscal Year 1982, more than 273,000 counterfeit notes valued at nearly $8,586,000 were passed, and over 1,484,000 notes valued at approximately $73,681,000 were seized prior to circulation. During this same period, government investigators uncovered only 86 counterfeiting plants throughout the country. Department of the Treasury, United States Secret Service, *Annual Statistical Summary FY 82*, at 2 (1982). By prohibiting the making of unauthorized impressions of United States currency, Section 474 ¶ 6 permits Secret Service investigators to assume that anyone in possession of negatives or prints of United States currency may

Appellee contends (Mot. to Aff. 88, 23-24) that the conduct prohibited by the statute involves "pure speech" and that, accordingly, the government has a heavier burden of justification than in the case of statutes involving conduct that combines "speech" and "nonspeech" elements. But the process of printing, photographing, or making an impression of United States currency involves a substantial amount of "nonspeech" conduct. In fact, this "nonspeech" conduct is, in many respects, indistinguishable from the conduct of counterfeiters, who clearly do not enjoy First Amendment protection for their illegal activities. (Most counterfeiters use the photo-offset process, which is the same process used to print most magazines (see J.S. App. 41a).) That is precisely why Section 474 ¶ 6 should be upheld as necessary to assist in the investigation and detection of counterfeiting.

Furthermore, the government's interest in preserving the integrity of the monetary system of the United States extends beyond a concern with counterfeiting. In a very real sense, the design and appearance of United States obligations and securities are the "property" of the government. The words of Justice White, concurring in the judgment in *Smith* v. *Goguen*, 415 U.S. 566, 586-587 (1974), are at least as apropos to laws—such as Section 474 ¶ 6—designed to protect the integrity of the Nation's currency as to laws regulating the use of the national flag of which he spoke:

> There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the

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be engaged in illegal counterfeiting activity. Given the large number of counterfeit notes passed and seized each year as compared to the relatively small number of counterfeit plants uncovered, it is reasonable to conclude that effective enforcement of the anti-counterfeiting laws would be significantly frustrated if there were no statutory restrictions on the printing or photographing of United States securities and obligations or if all such restrictions depended upon proof of criminal intent. See pages 34-35, *infra*.

> common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c.1, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777). It is a fact of history that flags have been associated with nations and with government at all levels, as well as with tribes and families. It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition. The United States has created its own flag, as it may. The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

In contrast to the flag, which serves only as a symbol of "nationhood and unity," the obligations and securities of the United States, which include Federal Reserve notes, Treasury bonds and notes, certificates of deposit, checks and drafts (see 18 U.S.C. 8), are the lifeblood of the Nation's commercial and economic existence. See *Davidson* v. *Lanier*, *supra*, 71 U.S. (4 Wall.) at 454 ("currency measures all values and is the medium, directly or indirectly, of all exchanges"). By the same token, like laws that regulate the use of the flag, Section 474 ¶ 6 may properly be viewed as simply restricting the uses to which the government's "property" may be put. In this respect, the instant case is analogous to this Court's decisions in *Greer* v. *Spock*, 424 U.S. 828 (1976),

and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), in which the Court "recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 538.

The district court purported to distinguish *Greer* and *Lehman* on the ground that "[t]his case does not concern the availability of a public facility for the exercise of the free speech right by private parties. [Appellee] does not seek to use the United States Courthouse in Foley Square as a facility from which to propound its views" (J.A. 145). But the design and appearance of United States obligations and securities are as much the "property" of the government—and are equally subject to reasonable restrictions on expression designed to protect their integrity—as were the military base in *Greer* and the transit system vehicles in *Lehman*, or, for that matter, the jail in *Adderley* v. *Florida*, 385 U.S. 39 (1966), and the letterboxes in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*.[16]

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[16] To be sure, unlike *Greer* and the other cases cited, this case does not involve "a debate over the dimensions of the concept of the 'public forum'" (Mot. to Aff. 23; footnote omitted). We submit, however, that these cases nevertheless are instructive because they suggest that the governmental interest in preserving its "property" for the uses to which it was dedicated may outweigh an individual's interest in using that property for his own expressive purposes. The problem with the approach of both the district court and appellee is that this case does not fit neatly into precast, textbook categories. Thus, appellee takes us to task (Mot. to Aff. 23 n.16) for suggesting that Section 474 ¶ 6 is, in effect, a "copyright" statute. The point of that suggestion (see J.S. 11 n.7), though, was simply to demonstrate that the statute may be compared to copyright laws in the sense that it limits the uses to which United States obligations and securities may be put.

Indeed, we note that appellee recently asserted the right to regulate a political candidate's use of a red border design in a campaign leaflet, on the ground that the design is protected, through trademark registration. See N.Y. Times, May 14, 1983, at 8, col. 1. In contrast to trademark protections, however, Section 474 ¶ 6 is con-

Appellee asserts (Mot. to Aff. 23 n.16), and the district court concluded (J.A. 146-147), that the statute may not be justified as protecting the integrity of the government's "property" because this, in effect, would require appellee to pay "homage" to the government's symbol. However, Section 474 ¶ 6 does not require appellee or anyone else to respect United States currency; it simply prohibits the printing and photographing of such currency. Nor does the statute "ban[] the use of illustrations of money because of the ideas such illustrations may symbolically represent" (J.A. 146-147); instead, the statutory prohibition applies across-the-board to all illustrations of currency, with complete indifference to the particular message sought to be conveyed by means of the illustration.

C. Section 504(1) Does Not Regulate Speech On The Basis Of Content Or Subject Matter, And Is Not Impermissibly Vague

As the foregoing discussion demonstrates, the prohibition in 18 U.S.C. 474 ¶ 6 on printing and photographing United States currency is permissible under the First Amendment because it does not significantly restrict protected expression and it is justified by a compelling governmental interest. Any doubt as to the constitutionality of Section 474 ¶ 6 is dispelled by Section 504(1), which creates a substantial exception to the prohibition in the former statute in order to accommodate expressive activities.

1. Section 504(1) permits publishers to include illustrations of United States currency in publications, provided that the illustrations are in black and white and are of a certain size, and provided further that the plates or negatives used in making the illustrations are destroyed. In its informed judgment, and based on the

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cerned, not with the property interests of private parties, but with the fundamental societal interest of preserving the integrity of the Nation's currency system.

recommendations of the Department of the Treasury, Congress deemed these limitations necessary in order to ensure that illustrations of currency would not facilitate counterfeiting or be used for fraudulent purposes. See pages 7-9, *supra*. Thus, Section 504(1) reflects Congress' careful attempt to balance legitimate First Amendment concerns and legitimate law enforcement concerns by permitting reproduction of photographs of currency so long as certain reasonable conditions—designed to protect against fraudulent use of those photographs—are satisfied. That congressional judgment is entitled to considerable respect. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973).

The limitations contained in Section 504(1) are content-neutral. They are not directed at the nature or quality of the idea that an illustration of currency is intended to convey. Instead, the limitations merely affect the manner in which an illustration of a dollar bill may be presented. Thus, the statute may be viewed as a reasonable time, place and manner regulation that is " 'justified without reference to the content of the regulated speech, that * * * serve[s] a significant governmental interest, and that * * * leave[s] open ample alternative channels for communication * * *.' " *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

2. The district court concluded, however, that Section 504(1) is not a proper time, place and manner regulation because in permitting the publication of illustrations of United States currency "for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers or albums," the statute regulates speech on the basis of content or subject matter (J.A. 149). In addition, the court found that the "purpose" and "forum" provisions of Section 504(1) are impermissible because there is an insufficient nexus between the

distinctions among the various purposes and forums, on the one hand, and the statutory goal of preventing fraud and counterfeiting, on the other (J.A. 150-151). Finally, the court held that the "purpose" and "forum" provisions are impermissibly vague because they do not clearly delineate the area of forbidden conduct (J.A. 151-152).

The constitutional problems that the district court discerned with respect to Section 504(1) all stem from the court's construction of the "purpose" and "forum" provisions as constituting absolute statutory conditions that must be met before an illustration of currency will be deemed lawful. But the court below erred in striking down the statute without attempting either to clarify its meaning or to interpret it more narrowly in order to alleviate the problems it discerned. It is well settled that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York* v. *Ferber*, *supra*, slip op. 22 n.24; see *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Schneider* v. *Smith*, 390 U.S. 17, 26-27 (1968); *United States* v. *Rumley*, 345 U.S. 41, 45 (1953).[17] Moreover, the Court will not reject a construction that saves a statute from unconstitutionality merely because another construction is arguably more consistent with Congress' intentions; "an Act of Congress ought not be construed to violate the Constitution if any other *possible* construction remains available." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979) (emphasis added). See, *e.g.*, *Pernell* v. *Southall Realty*, 416 U.S. 363, 365 (1974); *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974).

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[17] As the Court noted in *Schneider* v. *Smith*, *supra*, 390 U.S. at 26, this rule is a corollary of the general doctrine that the courts should construe statutes so as to avoid constitutional questions. See, *e.g.*, *United States* v. *Clark*, 445 U.S. 23, 27 (1980); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Section 504(1) clearly is susceptible of such a limiting construction. The legislative record does not support the view that Congress intended officials of the Executive Branch to enforce the statute based on the content of the stories accompanying an illustration of currency. Rather, as the district court itself pointed out (J.A. 125), Congress merely sought in Section 504(1) to institutionalize the Department of the Treasury's settled practice of permitting publishers of books, journals and newspapers to use illustrations of currency for numismatic, historical, educational, or newsworthy purposes. Thus, the reference in the statute to these various "purposes" and "forums" may be construed as descriptive and illustrative, rather than prescriptive and mandatory.[18] The legislative history makes clear that the overriding congressional objective in enacting the statute was simply to permit the use of illustrations of currency "in publications," in order to accommodate expressive interests and minimize the intrusion on First Amendment values, while at the same time continuing to prohibit "the printing of facsimiles in the likeness of paper money or other obligations * * *." S. Rep. No. 2446, *supra*, at 6; H.R. Rep. No. 1709, *supra*, at 4. So construed, the statute does not suffer from any of the constitutional defects that the district court perceived.

Appellee contends (Mot. to Aff. 27) that this proposed construction would not save the statute because it is un-

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[18] In the past, the Department of the Treasury apparently has taken the position that Section 504(1) prohibits illustrations used primarily for "decorative" or "eye-catching" purposes, and that illustrations must be accompanied by information relating to the particular item illustrated (see J.A. 49, 62, 107, 133 & n.9). We are informed, however, that the Department no longer adheres to this interpretation, and that the Secret Service has requested that the pamphlet entitled, *Use Of Illustrations Of Obligations & Securities Of The United States & Foreign Governments* be amended to delete any reference to this interpretation (see J.A. 62). In view of this change of position, there is no need for this Court to consider how, if at all, the Department's former position might have affected the Court's consideration of the constitutionality of the statutes.

reasonable to "confin[e] permitted pictures to 'publications.'" In its complaint, however, appellee did not even challenge the "forum" provision of the statute (see J.A. 9-11). Moreover, appellee, a publisher of magazines, clearly would have no difficulty complying with a requirement that illustrations of currency must be in publications. Accordingly, we submit that appellee lacks standing to challenge this requirement. "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, *supra*, slip op. 20. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); *United States* v. *Raines*, 362 U.S. 17, 21 (1960).[19] Although the Court has carved out an exception to this proposition where a party raises a First Amendment overbreadth claim (see *New York* v. *Ferber*, *supra*, slip op. 21), appellee's challenge to the requirement of Section 504(1) that illustrations of currency must appear in publications does not rest on a claim that these provisions are overbroad.

3. Appellee also asserts (Mot. to Aff. 27-28) that the statutory restriction as to color is "irrational" and that permitting appellee "to publish only black and white illustrations of money is substantially useless to its magazines." The purpose of the color restriction is to pre-

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[19] The Court in *Ferber* explained (slip op. 20) that this rule reflects the personal nature of constitutional rights and prudential limitations on constitutional adjudication. The Court further observed (slip op. 20-21; footnotes omitted):

> In *United States* v. *Raines*, *supra*, at 21, we noted the "incontrovertible proposition" that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953)). By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment."

vent the making of multiple plates or negatives—a crucial step in the process of producing an exact duplicate of United States obligations and securities. In response to a proposed amendment to Section 504(1) that would have permitted color reproductions of currency,[20] a representative of the Department of the Treasury made the following observations (J.S. App. 43a):[21]

> [P]ermitting the use of color illustrations would provide justification for possessing separate plates and negatives of the note, Treasury seals and serial numbers. This color separation process is a crucial step towards counterfeiting obligations. Under current law, only black and white illustrations are permissible; and therefore, only one negative in the printing process is required. Dropping the black and white restriction brings the legitimate printers a few steps closer to an actual counterfeiting operation. * * * The size restriction alone does not address the problem of widespread possession of color separation negatives, nor does it impact upon the availability of a ready-made alibi for the possessors.

The district court apparently accepted the opinions expressed by appellee's editors, in affidavits supporting appellee's motion for summary judgment, to the effect that the materials used to prepare appellee's illustrations of currency in color could not be used to counterfeit money (J.A. 146 & n.19). In our view, it was error for the court below to invalidate the statute on its face on the basis of these self-serving representations. In enacting Section 504(1), Congress relied on the advice of the Department of the Treasury, the Executive Branch department designated to administer and enforce the anti-counterfeiting laws, and determined that a ban on color illustrations of United States securities and obligations is necessary to protect against counterfeiting (see pages

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[20] H.R. 4275, 97th Cong., 1st Sess. (1981).

[21] The entire statement referred to in the text is included in an appendix to the jurisdictional statement at J.S. App. 40a-44a.

7-9, *supra*).[22] It is not the proper role of the courts to appraise the wisdom of Congress' judgment in this matter, so long as the statutory provision has a rational basis. The district court did not find that the color prohibition is irrational, and appellee's arguments on this score are entirely unpersuasive.

Contrary to appellee's assertion (Mot. to Aff. 28), the statutory provision requiring the destruction of negatives and plates does not eliminate the need for the restriction on color. It is the experience of the Department of the Treasury that negatives and plates are not always destroyed, but often find their way out of the print shop. Appellee itself cannot guarantee that its own plates and negatives will always be destroyed, but states only that it understands that such materials are disposed of "as a general matter."[23] Even if appellee could insure that

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[22] The Treasury Department continues to adhere to the position that "any permission to photograph and reproduce pictures of money, in color, would seriously weaken the safeguards designed to protect our currency" (J.A. 61). We note, in this connection, that Congress, in Section 504, differentiated between illustrations of currency in publications, and motion-picture films depicting currency, on the ground that counterfeiters do not use motion-picture films to prepare counterfeits. As a precaution, Congress nevertheless included a provision that prohibits the making of prints from motion-picture films except by permission of the Secretary of the Treasury (see note 6, *supra*).

[23] In an affidavit submitted in support of appellee's motion for summary judgment, Henry A. Grunwald, appellee's editor-in-chief, stated (J.A. 76-77):

> I understand that as a general matter, plates used in the production of covers for Time Inc.'s magazines are the property of the respective firms with which we have our printing contracts, and are routinely disposed of by the printers for their scrap metal value within a short time (say, 48 hours) after the print run is completed. The film from which the plates are made generally remains Time Inc.'s own property. We would be happy to comply with any reasonable requests from the Government for prompt destruction of the materials which are ours to destroy, and to seek suitable assurances from our

its plates and negatives would always be destroyed, this would not invalidate the statutory prohibition, for the government cannot obtain similar guarantees from every printer in the United States. It must be kept in mind that in assessing the constitutionality of the statutory scheme, the Court must consider not only appellee, but all others who would be entitled to publish reproductions of currency under the statute's provisions. See *Heffron* v. *International Society For Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 654.

By the same token, appellee's claim that the ability to print black and white illustrations of currency is of no use to its magazines is an insufficient basis for declaring the statute unconstitutional. In permitting illustrations of currency to be included in publications, Congress in Section 504(1) sought to be responsive to the expressive needs of book, newspaper and magazine publishers. At the same time, however, Congress also had to weigh the legitimate needs of law enforcement in detecting and preventing counterfeiting. In effect, appellee is contending that Section 504(1) must be held constitutionally infirm because some publishers find it inconvenient or aesthetically unsatisfying to comply with certain statutory provisions aimed at accommodating these dual concerns.

This contention trivializes the protection of "freedom of expression" embodied in the First Amendment. Under the statutory scheme, appellee is free to publish color photographs of everything except United States currency, and it may use black and white illustrations of currency for expressive purposes. Whatever thoughts or ideas appellee wishes to express by means of an illustration of currency can be expressed through a black and white

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printers respecting prompt and secure disposal of the materials which remain with them.

Appellee admitted that, in one instance, the materials used in producing a photograph of United States currency were not destroyed until three months after publication of the photograph and only after a Secret Service agent had instructed appellee to destroy the materials (J.A. 32).

illustration.[24] Indeed, perusal of a recent edition of one of appellee's magazines shows that slightly more than one-half of the photographs published were in black and white. See Time, May 23, 1983. Thus, it is absurd to suggest that appellee's desire to publish color photographs of United States currency, one side of which is mostly black and white, constitutes a constitutionally protected "right" to freedom of expression. Simply put, appellee's editorial preference for color photographs of currency does not suffice to invalidate the statutory scheme on the ground that it "directly and dramatically abridges the freedom to communicate" (Mot. to Aff. 10).

In claiming a constitutional right to print color illustrations of money, appellee points out that, due to recent technological advances, its magazines increasingly have come to rely on color photographs to accompany their texts (J.A. 77, 84-85, 91-92). But these advances in technology have also helped to facilitate the work of counterfeiters while making detection and enforcement more difficult. As the Department of the Treasury noted (J.S. App. 41a) in response to the proposed amendment to Section 504(1):

> The very fact that the technology is so advanced and quality printing is so widespread makes the suppression of counterfeiting activities all the more difficult. Counterfeiters, like printers, have benefited from today's advanced technology. In both instances, the "elite technology" has been replaced by the photomechanical process.
>
> It is important that the legitimate possession of negatives of United States currency be held to an absolute minimum.

The Treasury Department further pointed out that "[a]n instant alibi will be created for manufacturing and pos-

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[24] Contrary to appellee's characterization, therefore, the statutory scheme is not designed to "ban the publication of *pictures*" (Mot. to Aff. 19; emphasis in original). Rather, it simply regulates the manner in which publishers may depict an item every person sees every day.

sessing currency negatives * * * if color illustrations are allowed * * *" (J.S. App. 43a).

Appellee also asserts (Mot. to Aff. 28) that it should not be subjected to the color requirement of Section 504(1) because the particular pictures of currency that it thus far has reproduced have been "dramatically offsize and distorted" and not capable of being used to deceive or defraud. But the facial validity of the statute ought not to turn on the particular character of one publisher's pictures. The statute was expressly designed to provide a general rule of easy and reliable application—on the basis of objective size and color criteria—without the necessity for a burdensome case-by-case review of each illustration of currency that a publisher might wish to print.[25]

Appellee's argument, at bottom, is that Congress may not constitutionally punish those who, without intent to deceive, publish illustrations of United States securities and obligations. If appellee is correct, then the government would be powerless to prevent appellee or any other publisher from printing full size, full color representations of $100 bills, so long as the publisher could validly claim that the reproductions "constitute important editorial material" (Mot. to Aff. 24) protected by the First Amendment. While a publisher may have a perfectly legitimate editorial purpose for reproducing an exact or substantially identical copy of United States currency, and may in truth lack any intent to deceive or defraud, individual purchasers of publications containing facsimiles might not share that innocent intent and might seek to pass the facsimiles to others. The statutory scheme at issue here is designed to safeguard against precisely this

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[25] Not only would the alternative of a case-by-case review impose an intolerable burden on the Secret Service, but requiring government agents to decide in each instance whether a particular illustration has a "capacity to deceive" (Mot. to Aff. 28) would run the risk of arbitrary and discriminatory enforcement based on the content of the message. See, *e.g.*, *Smith* v. *Goguen*, *supra*, 415 U.S. at 572-573; *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 108.

sort of situation, which carries the potential for widespread deception and fraud.[26]

4. In sum, it is "fairly possible" to construe Section 504(1) so as to avoid the constitutional problems that the district court and appellee have perceived. If this Court concludes, however, that the statute cannot be saved by judicial construction, it should sever the two statutes and invalidate only Section 504(1), while leaving Section 474 ¶ 6 intact.

There can be no serious dispute that Section 474 ¶ 6 and 504(1) are severable. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v.

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[26] This is not simply an abstract concern. We are advised by the Secret Service that a magazine entitled *Impacto*, which was published in Mexico in March 1982, contained a full size, full color reproduction of a United States $100 Federal Reserve Note. As of March 1983, 147 copies of that reproduction were reported as having been passed in locations throughout the United States.

It is important to recognize in this connection that, as a result of either gullibility or inattention on the part of the recipients, counterfeiters often succeed in passing bills that bear little resemblance to the genuine article. This point is graphically illustrated by the following anecdote in W. Bowen & H. Neal, *The United States Secret Service* 174 (1960):

> In one New York case a watchmaker actually shaved the Lincoln oval from the faces of many genuine $5 bills without cutting through the paper, thus creating a sort of oval panel. In this panel he pasted a halftone oval picture of a local politician, cut from campaign literature. Using stenciled inserts, he pasted the numeral 20 over the fives in the corners, scraped off the word "Five" wherever it appeared, and with pen and ink substituted the word "Twenty." Several of the bills were passed in stores—and one was actually traced by the Secret Service to the wife of the local politician whose picture was substituted for that of Honest Abe! She had received the bill in cashing a check in a department store, and the fact that she never noticed her husband's photograph typifies the carelessness with which most Americans examine their money.

Corporation Commission of Oklahoma, 286 U.S. 210, 234 (1932). See, *e.g.*, *Buckley* v. *Valeo*, *supra*, 424 U.S. at 108-109; *United States* v. *Jackson*, 390 U.S. 570, 585-591 (1968). Here, it is quite plain that Congress did not view the two statutes as inseparable, because they were enacted nearly a century apart.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *ET AL.*,

Appellants,

v.

TIME INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 474 ¶ 6, a criminal statute which prohibits all expression through the use of photographs or artwork in the likeness of any portion of any specimen of United States currency, violates the First Amendment of the United States Constitution.

2. Whether 18 U.S.C. § 504, which exempts from the prohibition of § 474 ¶ 6 the publication of certain types of black and white illustrations of currency on the condition, *inter alia,* that such illustrations serve "numismatic, educational, historical or newsworthy purposes", violates the First Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

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Act of March 4, 1909, ch. 321, § 150, 35 Stat. 1116	8
Act of March 3, 1923, ch. 218, 42 Stat. 1437	8
Act of June 25, 1948, ch. 645, 62 Stat. 706	8
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S. Rep. No. 2446, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. Ad. News 5268	6, 8, 9, 10, 21, 40
Congressional Globe, 38th Cong., 1st Sess. (1864)	6, 7, 30

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Cox, *The Supreme Court, 1979 Term—Foreword*, 94 Harv. L. Rev. 1 (1980) 23

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) 32

Henkin, *The Supreme Court, 1967 Term— Foreword*, 82 Harv. L. Rev. 63 (1968) 23

Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1 36

Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1 42

IN THE

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v.

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

JURISDICTION

Appellee, Time Incorporated ("Time"), hereby adopts the jurisdictional statement in Appellants' Brief ("App. Br.") at 1.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal statutes involved here, Title 18, U.S.C. § 474 ¶6 and § 504, are provisions of Chapter 25 of Title 18, a lengthy and detailed statute which defines and provides for the punishment of offenses against the currency and other official obligations of the United States and foreign governments. The statutes and constitutional provisions are set forth in the Appendix to this Brief.

[1] References to the Joint Appendix are cited as "J.A. "; references to the Jurisdictional Statement filed by the Solicitor General are cited as "J.S. "; references to Appellee's Motion to Affirm are cited as "Mot. to Aff. "; and references to the Appellants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, dated September 9, 1981, are cited as "Mem. in Opp. ".

STATEMENT OF THE CASE

A. The Factual Background.

Time[2] publishes several popular magazines—TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, DISCOVER and LIFE—which report news and commentary on a multitude of subjects. As do all of the most popular magazines in this country, Time's magazines make extensive use of color photographs and other artwork to depict ideas and highlight themes expressed in their texts.[3]

Time's editors and art directors have used photographic and other illustrations of portions of United States currency to convey information and ideas to their readers on a wide range of issues. Pictures of money have appeared in Time's magazines, *inter alia,* to symbolize the toll of inflation; to represent the economic interests at stake in a presidential election; and to convey information and editorial opinions on matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in college basketball. Examples of such illustrations—each of which the Government has challenged as violative of 18 U.S.C. § 474 ¶ 6—are appended to the Complaint. (J.A. 13-23.)[4]

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[2] Appellee hereby adopts the list of parties in Appellants' Brief on the Merits, at i. Time Incorporated is a corporation organized under the laws of the State of New York. Its affiliates and subsidiaries (except wholly owned subsidiaries) are listed in the Mot. to Aff. vi-vii with the following additions: Adelphi Land Investments, Ltd.; American Family Publishers; Lakeshore Cablevision; Primus Investors, Ltd.; Rock-Time Inc.; Subscription Television of Texas; Temple Lumber Company; and TV-CABLE WEEK; and the following deletions: Bartlesville Video Inc.; Cablevision of Durham, Inc.; Champaign-Urbana Communications, Inc.; Colorado Springs Cablevision, Inc.; Menlo Venture Corp.; N.E.W. Media, Inc.

[3] The Government intimates that Time is asking this Court to elevate its editors' and art directors' personal preference for color illustrations to a First Amendment right (App. Br. 15, 32-33). In fact, it is not just Time's preference at issue here. For example, the 20 most popular magazines in the country (by average circulation) all publish with color covers.

[4] The illustrations are described in detail in the Complaint (J.A. 5-7, ¶ 9) and the Affidavit of Frederick A. O. Schwarz, Jr., submitted in support of Time's Motion for Summary Judgment (J.A. 30-35, ¶¶ 10-16).

As a universally understood symbol which can be used to communicate ideas on many matters of contemporary public concern, and to depict phenomena such as inflation and national deficits which are complex and difficult to summarize in words, the image of money is a uniquely versatile and powerful vehicle of symbolic visual expression. Freedom to use it in reporting the news is important to the journalists responsible for the editorial content of Time's magazines.[5]

Whenever an illustration of money has appeared in one of Time's magazines, the currency pictured has been significantly enlarged or reduced in size, discolored or otherwise distorted in appearance, shown only in part, and/or substantially obscured by printed legends or overlaid objects (*see* J.A. 13-23). Each illustration has appeared on only one side of a page, that page generally being of lightweight glossy stock. Since in most cases the expressive quality of such illustrations derives principally from the process of artistic interpretation and distortion, an actual-size, true-color, unembellished picture of a dollar bill—such as anyone could produce for a small charge in a color photocopying machine—is of little use to Time's journalists.

On numerous occasions within the past two decades, Federal law enforcement agents have advised Time that photographs and other artwork published or intended to be published in its magazines, including each of the illustrations appended to the Complaint (J.A. 13-23), violated the prohibitions of Title 18 respecting the publication of pictures of United States obligations. Time's employees have been warned repeatedly by these agents that Time must cease and desist from publishing such pictures. In addition, Time has been warned that its actions would be referred to the United States Attorney

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[5] Explanations of the editorial value of illustrations of money to the editors and art directors of Time's magazines, and facts relating to the decisions to publish some of the illustrations appended to the Complaint, appear in the record below in the Affidavits of Henry A. Grunwald, Editor-in-Chief of Time Incorporated (J.A. 71-79); Gilbert Rogin, Managing Editor of SPORTS ILLUSTRATED Magazine (J.A. 81-85); Ray C. Cave, Managing Editor of TIME Magazine (J.A. 87-93); Rudolph Hoglund, Art Director of TIME Magazine (J.A. 95-99); and Ronald L. Campbell, Art Director of FORTUNE Magazine (J.A. 101-03).

if Time did not cease and desist from further violations. (J.A. 29-35.)

On May 18, 1981, a Secret Service agent complained to a member of Time's legal department that a recent cover of SPORTS ILLUSTRATED Magazine (J.A. 23), which depicted a basketball net filled with hundred dollar bills, violated Federal criminal law. The agent further declared (i) that the Secret Service intended to seize all plates and other materials involved in the production of the SPORTS ILLUSTRATED cover; (ii) that the names and addresses of all individuals and firms involved in the design and preparation of the cover must be delivered to the Service; and (iii) that the agent wished to "interview" a member of Time's management (J.A. 35).

Ten days later Time initiated this action against the Secretary of the Treasury, the Director of the United States Secret Service and others, seeking a judgment declaring that § 474 ¶ 6 and § 504 are unconstitutional on their face and as applied to Time, and enjoining appellants from enforcing or threatening to enforce them.

B. The Statutory Framework.

1. Title 18, U.S.C. § 474 ¶ 6.

Section 474 is unequivocally an anticounterfeiting statute. One of 39 sections in Chapter 25 ("Counterfeiting and Forgery") of Title 18, the section is captioned "Plates or stones for counterfeiting obligations or securities", and its first four subparagraphs deal directly with that subject, separately prohibiting unauthorized possession, use, sale, importation and forgery of plates, stones and similar materials from which Government obligations are made. The seventh subparagraph of § 474 prohibits unauthorized possession of paper similar to that "adopted" by the Secretary of the Treasury for use in the preparation of Government obligations, and paragraph fifth varies the theme only slightly, proscribing possession of an actual counterfeit with the intent to use it.

By contrast, the sixth paragraph of § 474 relates to the manufacture, sale and importation of pictures—without regard to their size, shape, color, composition, or ability to deceive, confuse, or be used in counterfeiting operations. What it

proscribes is the execution, in any manner, of "any engraving, photograph, print or impression" in the "likeness" of United States obligations, or any part thereof. In authorizing the imposition of criminal sanctions, the paragraph does not require that the maker or seller of a "likeness" of currency produce or convey it with an intent to defraud, or intend that it be used in any manner relating to counterfeiting at all.

The net cast by the prohibition of § 474 ¶ 6 is extraordinary in its scope. It does not require that a prohibited "likeness" of currency be true, or even close, to the size or shape of the genuine article. Nor does it distinguish between a "likeness" true to the color of a specimen of currency, and one which is, for example, pink. Similarly, the prohibition applies with equal force to a "likeness" made of wood, aluminum or plastic; *a fortiori,* it equally proscribes "likenesses" printed on newsprint or on tissue paper, and those appearing on paper which resembles in at least some fashion the consistency and appearance of the material used to print currency. Moreover, it equally prohibits "likenesses" printed on two sides, as genuine specimens of currency are, and "likenesses" printed on only one side of a page.

The provision affords no guidance on how good or bad a "likeness" must be to trigger criminal sanctions. Indeed, the statute furnishes no qualifying standards to identify or limit the objects it proscribes—it simply bans all "likenesses".

In addition, the statute proscribes every rendering of "any part" of a specimen of currency. Thus, execution or sale of a picture of the border of a $1,000 bill, and of a picture of a $5 note which is twisted, folded or distorted, are both forbidden, so long as some fragment of the image of currency appears.

Of particular importance for present purposes, paragraph sixth of § 474 admits no distinctions among the various reasons for which a "likeness" of currency might be made, prohibiting alike the "likeness" intended to record human experience, to express an idea or opinion, or to deceive the public. Thus, equally banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a $20 bill; a green, six-foot enlargement of the portrait of George

Washington on a $1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, "In God We Trust", on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist's rendering of a "shrinking" dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation.[6]

Congress's objectives with respect to the prohibition upon illustrations of currency are buried deep in the past; if articulable goals ever existed, they have long since been forgotten. Section 474 is the lineal descendant of Section 11 of "An act to provide Ways and Means for the Support of the Government, and for Other Purposes", ch. 172, 13 Stat. 218, 221, which was enacted by the First Session of the 38th Congress, and signed by President Lincoln on June 30, 1864.[7] The proceedings of the 38th Congress shed virtually no light on Congress's intent with respect to § 11. However, both the text of the Act and its history in the Congress indicate that the primary—and pressing—purpose of the statute was to raise money needed to wage the Civil War.[8]

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[6] Section 474 ¶ 6 has been read by the courts as a flat ban on any likeness being created, regardless of the maker's intent or the likeness's capacity to deceive. *See, e.g., Webb v. United States*, 216 F.2d 151 (6th Cir. 1954) (no capacity to deceive); *Wholesale Vendors of Texas, Inc. v. United States*, 361 F. Supp. 1045 (N.D. Tex.), *aff'd mem.*, 486 F.2d 1402 (5th Cir. 1973) (no intent to defraud); *Wagner v. Simon*, 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976) (neither intent nor capacity to deceive); *Ex parte Holcomb*, 12 F. Cas. 828, 829 (C.C.D. Minn. 1871) (No. 6,598). The Department of the Treasury and the Secret Service have similarly enforced § 474 ¶ 6 with the same broad approach (even when considered with § 504(1)). (*See* J.A. 29-35, 61-62.)

[7] That "the prohibition contained in § 474 was originally enacted in the 1860's" is confirmed in S. Rep. No. 2446, 85th Cong., 2d Sess. 7, *reprinted in* 1958 U.S. Code Cong. & Ad. News 5268, 5273.

[8] Referred to in both houses of Congress as the "Loan Bill", *see, e.g., Cong. Globe*, 38th Cong., 1st Sess. 3209, 3289 (1864), the Act authorized, *inter alia*, the Secretary of the Treasury to borrow $400,000,000 on the credit of the United States, and to issue bonds or Treasury notes therefor (§§ 1-3, 13 Stat. 218-19); and to receive United States notes or the notes of national banking associations as a "temporary loan" in exchange for interest-bearing certificates of deposit (§ 4, 13 Stat. 219).

Three of the twelve sections of the 1864 Act were penal provisions which defined and provided for the punishment of counterfeiting and forgery of the new Federal obligations, and of Federal obligations generally, §§ 10-12, 13 Stat. 221-22. In virtually identical language, Congress created substantially the same offenses as § 474 now proscribes, in substantially the same order.

The concerns that actually motivated the legislature which enacted § 11 are not recorded. Such evidence as exists indicates that the Loan Bill was hastily drafted by the Secretary of the Treasury, *see Cong. Globe*, 38th Cong., 1st Sess. 3209, 3211 (1864) (remarks of Rep. Hooper), hastily considered by the Congress, and passed under urgent time constraints; indeed, there is reason to doubt that most of the members of Congress which passed the Loan Bill gave any thought to its anti-counterfeiting sections at all.[9]

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[9] The first trace of the 1864 Act is in the records of the House of Representatives for June 7, 1864—twenty-three days before the Act was signed into law—where it is indicated that a bill to provide for the support of the Government (H.R. 540) was reported from the Committee on Ways and Means, and promptly recommitted with the request that the Committee "have leave to report at any time", as "[t]he loan bills expire at the close of the present month, and this is to provide ways and means for the coming fiscal year". *Globe, supra,* at 2787 (remarks of Rep. Hooper). Within two weeks, the bill was reported back, ordered to be printed immediately, and referred to the Committee of the Whole. *Globe, supra,* at 3116.

The House debated H.R. 540 on June 22 and June 23, 1864, focusing primarily on the proposed loan. *Globe, supra,* at 3182-86, 3208-18. The sole allusion to § 11 in the course of the House discussion was an amendment proposed on June 23 by Representative Davis of New York, addressed to the sanctions clause. *See Globe, supra,* at 3209; 13 Stat. 222.

On Friday, June 24, 1864, H.R. 540 was introduced on the floor of the Senate, and referred to the Senate Committee on Finance. *Globe, supra,* at 3219. The Committee considered it only over the weekend. On Monday, June 27, the bill was returned to the floor, passed by the Senate and returned the same day to the House of Representatives, where the Senate amendments were promptly approved. *Globe, supra,* at 3289, 3311, 3351-52. H.R. 540 was signed by the Speaker of the House and the President *pro tempore* of the Senate on Wednesday, June 29, 1864. *Globe, supra,* at 3370, 3399. On July 1, 1864—the first day of the new fiscal year—it was reported to the Senate that President Lincoln had approved and signed H.R. 540 on June 30. *Globe, supra,* at 3481.

With minor changes in language, § 11 was reenacted as § 5430 of the Revised Statutes of 1878, Tit. LXX, ch. 5, Rev. Stat. 1052, and reenacted again as § 150 of the codification of 1909, Act of Mar. 4, 1909, ch. 321, 35 Stat. 1116. As revised, the substance of § 11 made its way through the first three editions of the United States Code; it was reenacted once again with minor changes in phraseology in the 1948 recodification of the penal laws, *see* Act of June 25, 1948, ch. 645, 62 Stat. 706, and has continued in that form to date.

2. Title 18, U.S.C. § 504.

In 1923, Congress modified the ban imposed by § 474 ¶ 6 to authorize certain illustrations of postage and revenue stamps. Act of March 3, 1923, ch. 218, 42 Stat. 1437. Thirty-five years later, apparently in response to the Treasury Department's desire to be rid of an administrative nuisance, *see* S. Rep. No. 2446, 85th Cong., 2d Sess. 5, *reprinted in* 1958 U.S. Code Cong. & Ad. News 5268, 5272, Congress expanded the exception to permit some illustrations of money under conditions that are now set forth in 18 U.S.C. § 504(1). Pub. L. No. 85-921, § 1, 72 Stat. 1771 (1958).[10] In creating this exception, Congress simply adopted precisely the same requirements previously imposed by the Secretary of the Treasury when he granted

[10] The Senate Committee Report states:

> "The Treasury Department receives numerous requests for special permission to use illustrations of paper money and other obligations and securities of the United States for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example, in school textbooks. Collectors of old paper money likewise wish to use illustrations of such money in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money to picture the currency in circulation during a particular historical period." S. Rep., *supra*, at 5.

Curiously absent from the list of "legitimate purposes" was the need of members of the press to report the news. The Committee did note, however, that "[n]ewspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations." *Id.*

"special permission" to individual applicants who requested permission to use pictures of money on an *ad hoc* basis. S. Rep., *supra*, at 5-6. Thus, § 504(1) permits the printing and publication of "illustrations" of currency only if such illustrations: (i) are in black and white; (ii) are of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of the matter illustrated; (iii) are for "numismatic, educational, historical, or newsworthy purposes"; and (iv) appear in "articles, books, journals, newspapers or albums".[11]

If anyone in Congress gave any thought to the obvious questions flowing from such legislation, the written record does not reveal it. No definition of the "educational, historical or newsworthy" purposes, for which such "illustrations" are permitted, is set forth in Title 18 or any other Federal law. Nothing in the legislative history of the statute explains why, or if, Congress perceived any basis for believing that illustrations of currency deemed by the Secretary of the Treasury to be "newsworthy" or "educational" might be more or less amenable to use in counterfeiting than any other kind, or explains why the Secretary was deemed competent to decide what is "newsworthy". Nor did Congress explain why black-and-white illustrations of paper money—the front of which is, of course, primarily black and white—were thought to pose less peril to the public than those which are pink, green or any other color.

One thing that is clear is that in enacting the restrictions in § 504(1) the Congress was addressing the "possibility of the *illustrations* being used as an instrument of fraud". S. Rep., *supra*, at 5; H.R. Rep. No. 1709, 85th Cong., 2d Sess. 3 (1958) (emphasis added).

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[11] Section 504(1) further requires that negatives and plates used in making illustrations permitted by that section be destroyed after their final use. Time does not object to this requirement; its concern here is with the statutory prohibitions on the publication of the pictures themselves. We do note, however, that the plates and negatives from which Time's illustrations of currency are printed contain the same distortions and obscuring designs as the finished magazine, and are, therefore, of no use to would-be counterfeiters.

At the same time that it enacted § 504(1), Congress also authorized a broad exemption from § 474 ¶ 6 for motion picture films, microfilms and slides bearing illustrations of currency and other official obligations, without restrictions as to size, color or purpose. Pub. L. No. 85-921, § 1 ¶ 2, 72 Stat. 1771 (1958) (codified at 18 U.S.C. § 504(2) (1976)).[12] The rationale for this exemption was summarized by the Senate Judiciary Committee in a single sentence: "The counterfeiter does not use a motion-picture film, microfilm or slide in the preparation of counterfeits. . . ." S. Rep., *supra*, at 7. It is equally clear, however, that the counterfeiter also does not use a distorted picture of money on the cover of FORTUNE, or the plate or negative used to produce such a distorted picture. Indeed, a color slide of an actual piece of currency (permitted by § 504(2)) in the hands of a counterfeiter is more likely to facilitate counterfeiting than anything created by Time.

C. The Proceedings Below.

On July 21, 1981, Time moved for summary judgment in the district court. Appellants cross-moved for summary judgment on September 9, 1981.

Time's principal claims in the district court were, *first*, that the prohibitions imposed in § 474 ¶ 6 and § 504(1) are impermissibly overbroad, and fail to satisfy this Court's standards for regulatory statutes abridging freedom of expression; and *second*, that § 504 is independently unlawful because it creates a content-based standard for permitted speech, and because it is impermissibly vague in violation of the Due Process Clause.

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[12] Section 504(2) does provide that illustrations appearing on films, microfilms or slides may not be used for advertising purposes (except philatelic advertising). Section 504(1) contains a similar prohibition. The design, execution or distribution of an advertisement "in the likeness or similitude" of any obligation or security of the United States is also independently proscribed in Title 18, U.S.C. § 475. Inasmuch as the issue here exclusively concerns Time's right to use illustrations of money for editorial purposes, the restrictions imposed upon advertisers are not at issue.

In support of its motion for summary judgment, Time submitted several affidavits and exhibits which set forth the pertinent facts underlying the controversy. (*See* pp. 2-3 nn.4, 5, *supra;* J.A. 25-103.) In opposition the Government submitted only a memorandum of law and made no attempt to controvert the factual showing made by Time.[13]

In the district court, the Government argued that § 474 ¶ 6 prohibits illustrations without regard to quality of the likeness or the intent or purpose behind them, but that its restriction on First Amendment rights was no greater than necessary to further the Government's interest in protecting against counterfeiting (Mem. in Opp. at 7-8, 18). The Government's central argument was that it was not compelled to permit a citizen to express himself in precisely the manner he may deem to be most effective and that § 474 ¶ 6 and § 504(1) were constitutional because they affected only the "style" of expression and not the content of the stories appearing in Time's magazines (*id.* 21). These statutes, according to the Government, constituted "reasonable restrictions" designed to ensure that "reproductions of currency which are made cannot be confused with the genuine articles and cannot be of assistance or inspiration to a counterfeiter" (*id.* 18). The Government also denied that § 504's requirements of an "educational, historical, or newsworthy" purpose regulated speech on the basis of content or that they were vague. In the district court the Government did not justify § 474 ¶ 6 and § 504 as necessary to regulate negatives of photographs, nor did it suggest the construction of § 504 it has offered to this Court.

Against the backdrop of principles of First Amendment jurisprudence to which this Court has adhered for more than

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[13] Only in this Court has the Government presented specific facts which it contends demonstrate both the need for the challenged statutes and the reasonableness of the choices made to effectuate the government interest in preventing counterfeiting. As we will demonstrate, the facts now asserted do not provide justification for the virtually limitless sweep of § 474 ¶ 6 or the hopeless jumble that constitutes § 504.

forty years,[14] and the uncontroverted factual showing in the affidavits submitted by Time, the district court held:

(i) that the visual image of money is a "powerful, expressive symbol", and that Time's use of the symbol in its magazines—"to dramatize or illustrate a set of facts, an existing condition, a moral crisis, a course of conduct"—constitutes protected speech (J.A. 138);

(ii) that § 474 ¶ 6 is unconstitutionally overbroad;

(iii) that § 504 creates an unconstitutional content-based standard for permitted speech;

(iv) that § 504 is constitutionally unacceptable as a regulation of the time, place and manner of expression; and

(v) that § 504 is unconstitutionally vague.

On June 18, 1982, the district court entered its Order and Judgment which granted Time's motion, declaring that § 474 ¶ 6 and § 504 are unconstitutional on their face and as applied to Time (J.A. 155-56). At the same time the court denied the Government's motion for summary judgment.

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[14] As the district court noted:

"Where a statute impinges upon protected speech, the burden is on the government to establish the validity of its asserted interest. *Schneider v. State*, [308 U.S. 147,] 161 [(1939)]. The judiciary has an overriding obligation 'to assess the substantiality of the justification[s] offered,' *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 69 (1981), and to ensure that the regulation promotes legitimate governmental ends with minimal intrusion on First Amendment freedoms. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes v.* [*Mayor of*] *Oradell*, 425 U.S. 610 (1976). 'The breadth of the legislative abridgment must be viewed in the light of less dramatic means for achieving the same basic purpose.' *Shelton v. Tucker*, [364 U.S. 479,] 488 [(1960)]. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button*, 371 U.S. 415, 438 (1963). *See Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)." (J.A. 141.)

SUMMARY OF ARGUMENT

The photographs and artwork that the Government claims are banned by the Federal statutes challenged here are the simplest and strongest arguments that these statutes are unconstitutional, certainly as applied to Time. Whatever may be the lawful reach of a legislative prohibition upon the execution of illustrations of currency, the current statutes, as applied to Time, proscribe distorted, fragmented pictures that have no conceivable capacity to endanger the public welfare, but constitute important editorial material which Time's journalists use to communicate with their readers. Standing alone these examples of what the Government calls contraband could well serve as the sole submission to prove Time's case.

It is simply fantastic to suggest that illustrations depicting George Washington's portrait in a life preserver (J.A. 15), folded oversized notes crammed in a diamond money clip (J.A. 21), or a "landscape" of enlarged and distorted $100 bills beneath open doors (J.A. 39),[15] are the raw materials of counterfeiters. A Federal prohibition of illustrations such as these serves no legitimate government interest. The statutes challenged here constitute an indefensible ban on protected speech.

As Justice Stewart has observed: No "government agency —local, state or Federal—can tell a newspaper in advance what it can print and what it cannot". *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 400 (1973) (dissenting opinion), *quoted with approval in Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255-56 (1974). Yet, pursuant to a set of illogical classifications grafted upon an indiscriminate prohibition, that is precisely what the statutes challenged in this lawsuit purport to do.

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[15] This photograph was challenged by the Secret Service, because it was in color and was a "photograph" instead of an "illustration" (J.A. 30), and the result was the substitution of a much less effective photograph employing coins, instead of $100 bills, to suggest a cash-rich company (J.A. 41).

Moreover, each statute at issue, § 474 ¶ 6 and § 504, is facially unconstitutional.

Section 474 ¶ 6 is a complete ban on pictures of United States currency without regard to their size, shape, color, composition or ability to deceive anyone. As the district court appreciated, the statute "remove[s] illustrations of money from the national discourse" (J.A. 139). It allows the Government to prevent Time and others from using a powerful and effective symbol to communicate the news to its readers. After almost 120 years, this sweeping ban—drafted in haste, passed under pressing time constraints by a Congress preoccupied by the threat of financial ruin, signed by a President in need of funds to wage a war of union, and routinely reenacted ever since—remains to be examined in the light of the constitutional axiom that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe [a] protected freedom". *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *see Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964).

The Government still clings to the theme that it is not compelled to permit a citizen to express himself in precisely the manner he may deem to be most desirable or effective. However, under our Constitution, the Government does not "permit" a citizen to express himself—effectively, ineffectively, or any other way. The fundamental presumption runs in the other direction. In this country a citizen starts out with the right to express himself or herself, effectively or ineffectively, on any subject—ranging from "[w]holly neutral futilities" to the recitation of "Keats' poems or Donne's sermons", *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), *quoted with approval in Cohen v. California*, 403 U.S. 15, 25 (1971) (Harlan, J.)—and to do so in any manner, from "informed and responsible criticism" to speech which is "foolis[h] and without moderation", *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944). In the furtherance of compelling governmental need that right may be subordinated,

but the restraint must be narrow, precise and clear. Here the Government has legitimate goals in the prevention and punishment of counterfeiting, but § 474 ¶ 6 bans speech which can present no conceivable risk to that public interest.

The Government may not, consistent with the First Amendment, forbid the use of a particular symbol to express an idea even if that idea may be stated in another way. *E.g., Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974) (per curiam); *Cohen v. California,* 403 U.S. at 24-26.

The Government now emphasizes two separate interests which it claims render § 474 ¶ 6 unassailable:

> (i) the prevention of counterfeiting and detection of counterfeiters; and
>
> (ii) the preservation of "the integrity of the monetary system".

The Government's claim that the statute is necessary to assist in the detection and investigation of counterfeiting, including a new focus on the negatives and plates used to make illustrations, merely heightens the overbreadth problem. Less restrictive alternatives already exist in Federal statutes (for example 18 U.S.C. §§ 471, 472 and 474 ¶ 4) which allow the Secret Service to prevent the use of plates and negatives from which counterfeits can be made and to arrest counterfeiters before they pass bogus currency to the public. There is no reason to believe the Government's efforts at preventing counterfeiting will be hindered by the absence of § 474 ¶ 6, which is made superfluous by the presence of these other statutes. Moreover, if negatives and plates, rather than the pictures, are the target of the enforcement effort, then those are the materials that should be regulated, without impinging upon the ability to use illustrations of currency.

The further assertion that the Government's "interest in preserving the integrity of the monetary system of the United States extends beyond a concern with counterfeiting" (App. Br. 22) is curious since the Government never identifies any

interest apart from counterfeiting that could conceivably justify regulating pictures of United States currency.[16]

The Government asserts that it owns the design and appearance of its obligations and that such "ownership" gives it some greater power than it would otherwise have to bar speech using that design. Yet parks, streets and sidewalks are presumed to be held open for public expressive activities, *Hague v. CIO,* 307 U.S. 496, 515 (1939) (opinion of Roberts, J.), and the Government's ability to restrict expressive conduct is "very limited", despite its ownership of these places, *United States v. Grace,* 103 S. Ct. 1702, 1707 (1983).

Furthermore, the interest in preserving the currency "for the uses to which it was dedicated" (App. Br. 24 n.16) is not a basis for barring illustrations of currency as a symbol of expression. Such use is not inconsistent with the use to which this "property" has been dedicated. The "integrity" of the Nation's currency system is not at stake in the publication of Time's covers, nor is it at stake when protestors like Gale Wagner create three-foot-long posters of currency, *Wagner v. Simon,* 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd,* 534 F.2d 833 (8th Cir. 1976). Whether or not mutilation of actual Federal Reserve Notes could be prohibited, as mutilation of a public building could be, mutilation of photographs or illustrations of a public building is not punishable for lack of respect for governmental property, and the same holds true for currency.

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[16] To some extent the "integrity" notion seems related to the Government's references to the work of the "Framers of the Constitution" and the status of Federal Reserve Notes as "the lifeblood of the Nation's commercial and economic existence" (App. Br. 16, 23). However, that approach ignores the fact that our Nation's founders had high regard for First Amendment freedoms:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth; . . . that public discussion is a political duty; and t..at this should be a fundamental principle of the American Government." *Whitney v. California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The Government admits that it may not punish conduct disrespectful of the currency simply because it is disrespectful. Other than that interest, or the interest in preventing counterfeiting, the Government has given no content to the notion of the "integrity" which is purportedly protected by § 474 ¶ 6.

Section 474 ¶ 6 is a statute that sweeps within its ambit such a broad range of expression protected by the First Amendment that it must be struck down on its face.

The Government next asserts that any constitutional problems with § 474 ¶ 6 are cured because that provision must be read in conjunction with 18 U.S.C. § 504(1) (App. Br. 19, 25). However, the arbitrary requirements for exemption set forth in § 504(1) simply perpetuate the overly broad ban of § 474 ¶ 6. Section 504(1) continues the prohibition of pictures of currency which fail to satisfy a list of requirements—size, color, forum and purpose—that do not reasonably relate to preventing illustrations that might pose a risk to the public welfare. Since all the illustrations of currency at issue here are still prohibited by the statutory scheme, including § 504(1), that section cannot save § 474 ¶ 6.[17]

Wholly apart from its failure to distinguish protected speech from conduct that endangers public safety, § 504 is

[17] The Government's ever-shifting approach throughout this case serves to underscore the serious problems it has defending the statutory scheme. At times, the Government has asserted and then abandoned several arguments, including its reliance on *Wagner v. Simon* (J.S. 7; Mem. in Opp. 13-16) which upheld the constitutionality of § 474; its belief that § 474 ¶ 6 "protect[s] in every way the value and respect for instruments" of the United States (Mem. in Opp. 8; *compare* App. Br. 25); its reliance on the theory that the statutory scheme is required to forestall persons working in the printing business from having "their interest sparked by discovering the ease with which a note can be counterfeited" (J.S. 16-17 n.10); its reliance on the fact that government officials have not used the purpose and forum provisions in enforcing the statutes (J.S. 14 n.9; *compare Wagner v. Simon*); and its statement that *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), "strikes at the very heart of [Time's] claims" (Mem. in Opp. 20; *compare* App. Br. 24 n.16).

facially unconstitutional because it creates a content-based standard that is also unconstitutionally vague.

The district court cogently explained that:

> "Section 504's concern with 'philatelic, numismatic, educational, historical, or newsworthy' purposes is constitutionally impermissible. Governmental action that regulates speech on the basis of its subject matter " 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Police Department of the City of Chicago v. Mosley*, [408 U.S. 92, 99 (1972)]. In enforcing § 504 the government decides whether the purpose of the illustration is 'philatelic, numismatic, educational, historical or newsworthy' and whether the forum in which it appears is indeed an article, a book, a journal, a newspaper or an album. Such decisions are based on content or subject matter. Succinctly put, § 504 requires judgments about the nature and quality of the message contained in the illustration, about the nature and quality of the article to which the illustration relates, and about the nature of the forum containing the illustration, types of judgment the First Amendment prohibits the government from making. *Cohen v. California*, 403 U.S. 15, 24 (1971); *Thornhill v. Alabama*, [310 U.S. 88 (1940)]." (J.A. 149.)

In addition, when measured against the standards reaffirmed in *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 622 (1976), § 504(1) is unconstitutionally vague. As the district court noted, "[i]t has long been recognized that time, place and manner regulations which vest in law enforcement authorities the capacity for discretionary enforcement or subjective definition of an offense are instruments for censorship" (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Heffron v. ISKCON*, 452 U.S. 640 (1981)) (J.A. 151-52, footnote omitted). "The determination of what is 'philatelic, numismatic, educational, historical, or newsworthy,' " the district court observed, "is rife with assumption and open to varying interpretation," and "[t]he definition of a journal, newspaper or album is anyone's game to play" (J.A. 151). In addition, the

"vice of vagueness" in § 504(1) is starkly illustrated by the constructions adopted by the agencies that enforce the statute (*see* pp. 4, 6 n.6, 13 n.15 *supra*, and pp. 37-39 *infra*), culminating in an interpretation requiring that the illustration not be "decorative" or "eye-catching" and be accompanied by "numismatic, educational, historical or newsworthy" information relating to the specific Federal Reserve Note pictured (J.A. 33, 49, 62). This effectively obliterates the narrow exemption that § 504(1) theoretically affords.

The Government proposes to cure these defects by offering for the first time in this Court a "narrowing construction" of § 504's purpose and forum requirements. However, its suggestion that the purpose and forum requirements be read to require only that the illustration appear in a "publication" is contrary to the language of the statute, is unrelated to any purpose Congress appears to have considered, still lacks any reasonable nexus with the goal of prevention and detection of counterfeiting, and still leaves § 504(1) banning Time's illustrations and those of others such as the political protester in *Wagner v. Simon*.

The deficiencies in § 504(1) underscore the basic constitutional offense of the statutory scheme challenged in this action. Rather than seeking in the first instance affirmatively to define those "likenesses" of money which might realistically imperil the integrity of the currency, almost 120 years ago Congress hastily enacted a broad negative—a blanket prohibition whose objectives are by now thoroughly obscure. Ninety-four years later, instead of attempting to correct the fundamental problem by repealing the statute and starting again, Congress chose to engraft upon the ban a series of poorly constructed and unconstitutional exceptions, borrowed from the customary practices of the Treasury Department. Thus, even though the First Amendment ensures that all speech is permitted except that which is expressly and justifiably forbidden, the premise of the present statutory scheme is exactly contrary: all use of a particular expressive symbol is prohibited except that which the Government allows.

The solution to the constitutional infirmities presented in this case is not judicial manipulation of two indefensible statutes. Rather, elimination of the problem lies in new legislation that Congress plainly knows how to write. The current law prohibits speech which does not impinge upon the Government's interest in prevention of counterfeiting, and regulates such speech as the Government allows based upon criteria which bear no substantial relation to the fulfillment of that interest. The statutes in question were thus properly struck down in the court below.

ARGUMENT

This is not a case involving a challenge to the power of Congress over the monetary system or the authority of Federal law enforcement agencies to seize paraphernalia used, fitted, or intended to be used for counterfeiting. Nor is this a case involving the Government's right reasonably to regulate activity occurring on its property.

This is also not a case in which Time asserts it has the "absolute right" to print illustrations of currency in any manner which it chooses, although Time probably does have an "absolute right" to print illustrations of currency or anything else in any manner which it chooses, unless the Government can explain why it should not.

What Time does assert is that a law that purports to control the editorial content of its magazines—including a law appearing in the anti-counterfeiting sections of Title 18 that restricts the opportunity to illustrate currency—must satisfy the constitutional standard for regulatory statutes impinging upon freedom of expression. This case involves the First Amendment right to use a potent visual symbol, one that is both intended and understood as a vehicle for the communication of ideas, in the absence of any showing that the uses Congress has prohibited pose a substantial risk to the fulfillment of a compelling government interest.

Moreover, this suit does not concern the Government's power to detect and punish criminals like the persons described

in the Statement of Deputy Assistant Secretary of the Treasury Robert E. Powis on H.R. 4275 (J.S. App. 40a-43a), or mentioned in the Government's Brief (*e.g.*, at 21 n.15, 35 n.26). Each of these criminals could be prosecuted without resort to § 474 ¶ 6 under the several sections of Chapter 25 that outlaw counterfeiting (*see* pp. 27-28 nn.22, 24 *infra*).

This lawsuit is exclusively concerned with the scope of the Government's power to ban the publication of pictures.

Faced with the obvious constitutional problems in defending this statutory scheme, the Government has now turned its focus from the pictures which are at the heart of this case to the plates and negatives created during the process of producing the illustration. The only indication of Congress's concern with such materials is in § 504(1)(iii), which requires the destruction of plates and negatives after use. In fact, the legislative history shows that the central concern of Congress in § 504(1) was with "illustrations" and their capacity to defraud. *See* S. Rep., *supra*, at 5-6.

But even if the focus is on the plates and negatives the statutes cannot survive scrutiny under the standards applied to regulations infringing protected speech. The lines drawn by the statutes in issue simply do not pass muster under

> " . . . the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

A. The First Amendment Interest at Issue.

The image of money is a vital tool of contemporary visual journalism primarily because of its unique value as a symbol of so many matters of public concern, from problems of inflation and monetary policy, to debates over the Federal budget and the allocation of public funds, to the salaries of motion picture

stars and corruption in big business and sports. Precisely because a picture of a dollar may be used artistically to embrace such an enormous range of subjects, and serves graphically to depict so many phenomena, such as inflation, the image of currency is an expressive symbol for which there is no adequate substitute. The statutory prohibition on its use thus deprives print journalists of an important vehicle of comunication, and of competition for attention in the marketplace of ideas—a marketplace in which broadcast media are free of similar constraints.

In defense of the statutory scheme, the Government first denies that there is a significant First Amendment problem at all; it claims that a ban on illustrations of money "does not implicate the central concern of the First Amendment", because it does not prohibit "the substance of any message appellee wishes to convey" (App. Br. 20). The Government's position is that as long as the press is free to print stories about the economy, it may be prevented from using the symbol of money, the most effective of all symbols of economic conditions, in those stories. However, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. California,* 403 U.S. at 26.[18] Absent a "justifiable interest in regulating speech . . . governmental bodies may not prescribe the form or content of individual expression". *Id.* at 24; *see Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 533-35 (1980). It is precisely because "one man's vulgarity is another's lyric" that the Constitution "leaves matters of taste and style so largely to the individual". *Cohen v. California,* 403 U.S. at 25.

The Government's position also overlooks the fact that the symbol of money is chosen precisely because it is simple, powerful and easily understood; in short, because its communicative and emotive impact is so great. In the marketplace of ideas it is often not the bare exposition of the idea but the clothing in which the speaker chooses to present it which "sells"

[18] Indeed, this warning is particularly apt here given the Government's later attempt to justify § 474 ¶ 6 as a measure to protect the "integrity" of a national symbol (App. Br. 23-24).

it to the listener. This choice is also protected by the First Amendment:

> "Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Id.* at 26.

It is also not a defense of this statutory scheme to suggest that the use of a powerful expressive symbol by Time or anyone else can be suppressed because, in the Government's view, the idea it represents may be voiced another way. This Court rejected that argument "summarily" in *Spence v. Washington*, on the strength of the forty-year-old observation that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " 418 U.S. at 411 n.4 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *accord Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Thornhill v. Alabama*, 310 U.S. at 105-06. If the statutes Time challenges are valid, it cannot be because the Government thinks that Time ought to be able to convey the news another way.[19]

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[19] *See* Cox, *The Supreme Court, 1979 Term—Foreword*, 94 Harv. L. Rev. 1, 50 (1980); Henkin, *The Supreme Court, 1967 Term—Foreword*, 82 Harv. L. Rev. 63, 79 (1968). The Government's position is inconsistent with the undisputed facts as well as with the Constitution. For, while the Government seems to suggest that Time could as easily put across its editorial message by printing other illustrations, the Government has failed to controvert the sworn judgment of Time's editors and art directors that it could not do so (Aff. of Henry A. Grunwald, ¶¶ 10-11 (J.A. 75); Aff. of Gilbert Rogin, ¶ 7 (J.A. 84); Aff. of Ray C. Cave, ¶¶ 5-9 (J.A. 89-90); Aff. of Rudolph Hoglund, ¶¶ 3-6 (J.A. 96-97); Aff. of Ronald N. Campbell, ¶¶ 4-6 (J.A. 102-03)).

Indeed, what the statutory scheme really amounts to is an abridgement of the rights of editors and publishers to exercise editorial control and judgment over the material they publish. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald*

In short, a significant First Amendment interest is implicated by the Government's total ban on the use of a particularly evocative symbol.

B. Section 474 ¶6 Is Unconstitutionally Overbroad.

1. Section 474 ¶6 is not drawn with the required specificity.

The standards against which the statutory prohibition must be measured are simple and familiar. A statute which impinges on freedom of expression must further a sufficiently substantial government interest, and "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity", *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963).[20] As Justice Murphy observed long ago, blanket prohibitions may be "more convenient to the law maker", and "easier to fashion" than regulatory measures tailored to afford adequate protection to the public welfare without suppressing legitimate expressive conduct. *Martin v. City of Struthers*, 319 U.S. 141, 151 (1943) (concurring opinion). But that cannot justify indiscriminate abridgment of freedom of speech, for the First Amendment commands that a statute be "narrowly drawn to cover the precise situation that calls for remedial action". *Id.* at 149 (quoting *Thornhill v. Alabama*, 310 U.S. at 105).

Equally fundamental is the proposition that the means adopted to achieve a legitimate governmental end must directly promote the objective in view, and entail no greater intrusion upon First Amendment freedoms than is necessary to further the public interest asserted. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980),

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[20] *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633, 637 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. at 620; *Police Department v. Mosley*, 408 U.S. at 98-99; *Gooding v. Wilson*, 405 U.S. at 522; *Zwickler v. Koota*, 389 U.S. 241, 250 (1967); *United States v. Robel*, 389 U.S. 258, 264-66 (1967); *Aptheker v. Secretary of State*, 378 U.S. at 508; *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943); *Cantwell v. Connecticut*, 310 U.S. at 310-11.

and cases cited therein. The classic statement of this requirement is in *Shelton v. Tucker:*

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." 364 U.S. 479, 488 (1960) (footnotes omitted).

Viewed in the light of these basic principles, § 474 ¶ 6 cannot withstand constitutional scrutiny.[21] While not "aimed" at speech, the statute directly and dramatically abridges the freedom to communicate by means of a symbol unique in its capacity to convey certain ideas. And in an area where the Constitution demands that regulatory statutes be narrowly drawn to further the Government's ends without unnecessary intrusion upon protected expression, the means adopted here lurch widely and erratically far off the mark. In the name of the legitimate goals of prevention and punishment of counterfeiting, § 474 ¶ 6 bans the execution and publication of pictures that pose no conceivable danger to the public interest pursued, and that are unmistakably intended and necessarily understood solely as instruments for the communication of ideas.

As the district court found, the prohibition imposed by § 474 ¶ 6—which "casts its net over any and all likenesses of . . . currency, whether or not any given likeness has the capacity to deceive or to act as a vehicle for counterfeiting" (J.A. 146)—is not drawn with the specificity required to avoid unnecessary intrusion upon protected speech:

> "Neither the illustrations of money used by plaintiff nor the plates used to print those illustrations can be used to

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[21] The Government claims that the constitutionality of § 474 ¶ 6 cannot be considered apart from § 504(1) (App. Br. 19). However, it also claims that if § 504(1) is unconstitutional, § 474 ¶ 6 can stand alone as a constitutional regulation of free expression (*id.* 35-36). We consider the infirmities of § 474 ¶ 6 separately to demonstrate that the Government's latter claim is untenable. As we show, pp. 34-35 *infra*, even the combination of § 504(1) and § 474 ¶ 6 is unconstitutional.

> counterfeit money, or as counterfeit money. To criminalize illustrations such as those employed by plaintiff that have no utility for fraud or forgery and that cannot be used for counterfeiting, but which do serve as vehicles for artistic or journalistic expression, violates the First Amendment by interfering unduly with protected speech. There are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse." (J.A. 146, footnote omitted.)

Both the massive overbreadth of § 474 ¶ 6 and the expressive significance of the conduct it condemns are best appreciated not by hypothetical examples, but by the actual applications of the law—*e.g.*, to the distorted, discolored, fragmented magazine illustrations published by Time. The statute has also been found to justify the confiscation by the Secret Service of a three-foot-long poster of a Federal Reserve Note that had been doctored to appear as a "$30" "Inflationary Note" with a picture of former President Richard Nixon in the center, and had been executed by the artist, Gale Wagner, as a political statement on Mr. Nixon's economic policies and his involvement in the "Watergate" affair. *Wagner v. Simon,* 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd,* 534 F.2d 833 (8th Cir. 1976). The criminalization of such artwork under an anticounterfeiting law surely lends new meaning to the concept of "broadly prophylactic" regulation of protected expression. *See, e.g., Schad v. Borough of Mt. Ephraim,* 452 U.S. at 70; *NAACP v. Button,* 371 U.S. at 438.

The Government contends that § 474 ¶ 6 cannot be more narrowly tailored because the statute is aimed not only at punishing counterfeiters but is also designed to "facilitate the government's efforts at *detecting* and *investigating* counterfeiting activity" (App. Br. 21, emphasis in original). Striking down § 474 ¶ 6, warns the Government, will seriously hamper law enforcement officials because counterfeiters will "conceal their criminal conduct by associating with legitimate print shops, thereby availing themselves of an instant alibi" (App. Br. 21).

This dire prediction notwithstanding, § 474 ¶ 6 is hardly the linchpin of the Government's efforts against counterfeiting in this country. The Government possesses an enormous sweep of authority under the remaining sections of 18 U.S.C., Chapter 25 (§§ 471-509) to investigate, detect and punish counterfeiting of all types.[22] Interestingly, the Government parades statistics before this Court concerning the magnitude of counterfeiting activity in this country (App. Br. 21 n.15), but sheds no light on the question whether the effectiveness (or ineffectiveness) of the Government's anticounterfeiting efforts has anything to do with the existence or scope of § 474 ¶ 6, the particular statute challenged here.[23]

The Government also asserts that prohibition of "unauthorized impressions" is necessary because it "permits Secret Service investigators to assume that anyone in possession of negatives or prints of United States currency may be engaged in illegal counterfeiting activity" (App. Br. 21-22 n.15). This justification is doubly problematic. First, the argument begs the question: It is by no means clear that such an assumption is in

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[22] For example, it remains a crime to forge, counterfeit or alter any United States obligation with intent to defraud, 18 U.S.C. § 471; to pass, utter, publish or sell (or attempt to pass, utter, publish or sell), or to import, possess or conceal a forged, counterfeited or altered obligation with intent to defraud, § 472; or to buy, sell, exchange, transfer, receive or deliver any forged, counterfeited or altered obligation with the intent that the same be passed, published or used as true and genuine, § 473. Section 474 ¶ 4 makes it a crime for anyone to possess, with the intent to forge or counterfeit, a plate, stone, or other thing (including photographic negatives) which resembles plates used to make currency. *See United States v. Dixon*, 588 F.2d 90, 91-92 (4th Cir. 1978). Thus the Treasury Department has ample means to arrest would-be counterfeiters before they strike. The intent requirement is not a difficulty since unlawful intent may be proved by the totality of the circumstances, as it is in prosecutions for the sale or possession of other types of contraband, *e.g.*, drugs. Section 474 ¶ 4 thus makes the obvious and common sense distinction between the editors of TIME Magazine and producers of flash notes (*see* J.S. App. 41a-43a), something which the Treasury Department seems unable to do.

[23] In fact, since the criminal conduct reached by § 474 ¶ 6 is already reached by other statutes, *see* n.22 *supra*, the statistics would seem to be irrelevant.

any way legitimate. Surely mere possession of the negatives used to create Time's covers, depicting distorted illustrations of currency, cannot reasonably lead to the inference that they are to be used for counterfeiting.

Second, the theory that anyone simply possessing negatives may be assumed to be engaging in counterfeiting is unsupportable under the current combination of § 474 ¶ 6 and § 504(1). Considering § 504(1), possession of negatives prior to their use, if not punishable under § 474 ¶ 4, is illegal *only* if (a) the *illustrations* are not destined to appear in "articles, books, journals, newspapers, or albums"—a fact impossible to know in advance; (b) the illustrations will not be used for "educational, historical or newsworthy purposes"—another fact impossible to know in advance; and (c) the illustrations will be published in color—which cannot be determined from the negatives since black-and-white illustrations can be made from four-color negatives. Thus, as presently written, the law cannot possibly serve the purpose the Government has manufactured for it, even were that purpose legitimate, which, as shown above, it clearly is not.

What the Government does have a legitimate interest in is identifying and punishing persons who possess photographic negatives with the intent to use them in counterfeiting. This is already independently punishable under 18 U.S.C. § 474 ¶ 4, whose constitutionality has not been questioned by Time.

Hence, all the criminal activity with which the Government has now professed special concern is separately punishable under other provisions of Title 18.[24] Section 474 ¶ 6, far from

[24] For example, in each of the cases noted in the Treasury Department Statement reproduced in the Jurisdictional Statement (J.S. App. 40a-43a), existing counterfeiting statutes other than § 474 ¶ 6 would be adequate to prosecute the counterfeiters apprehended. In each case large amounts of counterfeit bills produced by each defendant were seized, indicating an intent to sell or pass those bills for an unlawful purpose. Moreover, there is no suggestion made by the Government here that § 474 ¶ 6 would be required to prosecute those individuals. Nor does the Government suggest that § 474 ¶ 6 would be required to prosecute or apprehend the watchmaker who turned actual $5 bills into $20 counterfeits (App. Br. 35 n.26). Section 471 adequately covers that watchmaker's activity.

being a necessary component of the Government's battle against counterfeiting, is no more than a fifth wheel, and an unconstitutionally overbroad one at that. Indeed, the fact that the Government's legitimate enforcement goals are already achieved through the other provisions of Chapter 25 is proof positive of a less restrictive alternative to § 474 ¶ 6—that alternative is the set of statutes Congress has already enacted into law.

2. Section 474 ¶ 6 is not a valid means of protecting the "integrity of the Nation's currency system".

The Government asserts that its "interest in preserving the integrity of the monetary system . . . extends beyond a concern with counterfeiting" (App. Br. 22). However, the Government has so far failed to identify this separate interest, although it admits that it is not a "copyright" interest (*id.* 24 n.16), nor an interest in requiring "respect" for the currency (*id.* 25).[25]

Certainly the Government cannot assert that the physical integrity of its "property"—the creation and disposition of the dollar bills issued by the Treasury Department to serve as the nation's circulating medium—is at stake, beyond the concern with counterfeiting. Rather, the Government must be asserting a right to regulate illustrations of this "property" in order to protect its "integrity".

The legislative history of § 474 ¶ 6 offers no support for this integrity-beyond-counterfeiting theory. While there is no direct evidence as to the congressional intent in enacting § 474 ¶ 6, the circumstantial clues that exist indicate that this section was intended solely to prevent and punish counterfeiting. (*See*

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[25] At one point the Government was asserting just such an illegitimate objective (Mem. in Opp. 8). That, of course, could not withstand scrutiny. It has been settled for half a century that neither the Congress nor the legislature of any state may select the symbols to which the inhabitants of this country must pay their respect. *See, e.g., Schacht v. United States*, 398 U.S. 58 (1970); *Street v. New York*, 394 U.S. 576 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931).

pp. 6-7, *supra.*) Far from undertaking in 1864 to sanctify the visual image of Federal notes as the symbol of the Nation's exclusive circulating medium—which did not, of course, exist for bank notes manufactured by private printing firms circulated as currency in many states—Congress specifically acted to preserve the rights of their private owners to the plates, inks, colors and pigments by which Federal obligations were made. *See Globe, supra,* at 3209 (remarks of Rep. Davis); *id.* (remarks of Rep. Brooks); *id.* at 3289. The notion that the ban now embodied in § 474 ¶ 6 was in any way intended by its draftsmen to enshrine the symbol of money as the unencroachable property of the Federal Government is, at best, fanciful.

Whatever the Government means by its asserted right to protect the "integrity" of the currency, it derives its argument from its claimed ownership of the design and appearance of the currency. Its theory requires the Court to accept that "the design and appearance" of Federal Reserve Notes are sufficiently like real property of the Government to warrant similar treatment for First Amendment purposes, and that, *by virtue of the fact of ownership,* " 'the government may bar . . . certain speech' " (App. Br. 24). However, the "property" cases relied upon by the Government—*Adderley v. Florida,* 385 U.S. 39 (1966), *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), *Greer v. Spock,* 424 U.S. 828 (1976), and *United States Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981)—cannot be analyzed apart from the specific issues and facts presented to the Court in those cases. Those decisions all are grounded in the "public forum" concept, and the Government agrees that those cases are not on point here (App. Br. 24 n.16). The Government does seem to believe that it can derive from these cases some measure of additional power to regulate property because of its being the owner (*see id.* 14, 24).

This Court, however, has never held that the fact of Government ownership of the property in question in any way increases the Government's power to regulate it with respect to

expressive activity. Rather, public places—public parks, streets, sidewalks and fairgrounds, all of which are "in a very real sense the 'property' of the government,"—are presumptively public forums. To restrict expressive conduct there, the Government must not only advance a significant interest, it must demonstrate that it is furthering that interest by content-neutral and otherwise narrowly tailored means that leave open ample alternative channels of communication.[26]

The reservation added by *Adderley v. Florida*, 385 U.S. at 47-48, and its progeny (*Greer, Lehman, Greenburgh*) is that there is no merit to "an argument [that] has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please". The speaker who wishes to make public property a public forum cannot defeat all time, place and manner regulations merely by noting that he is on public property. *Adderley* and its progeny hold that the Government can rebut the presumption that public property is a public forum by showing that the particular place in question has not "traditionally served as a place for free public assembly and communication of thoughts by private citizens," *Greer v. Spock*, 424 U.S. at 838, that is, the speech "would disrupt the legitimate governmental purpose for which the property has been dedicated", *Consolidated Edison v. Public Service Commission*, 447 U.S. at 538.

The lesson to be learned from the public forum cases is that the Government may only regulate speech on its property if it can show that a sufficiently strong interest is jeopardized—the same requirement as for regulations impairing speech generally. But the creation of distorted, or oversized or

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[26] *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *Heffron v. ISKCON*, 452 U.S. 640, 647-48 (1981); *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 562-64 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963); *Cantwell v. Connecticut*, 310 U.S. at 304; *Thornhill v. Alabama*, 310 U.S. at 105; *Schneider v. State*, 308 U.S. at 162.

obscured illustrations of currency in no way endangers, interferes with or is inconsistent with the function of that currency.

Even the rule that the Government derives from the public forum cases—that the uses to which Government property is dedicated may outweigh the public's interest in using that property for expressive purposes (App. Br. 24 n.16)—does not change the analysis of § 474 ¶ 6. The cases the Government relies on require it to demonstrate that the expressive use will be inconsistent with the Government's own. That it has not done, nor could it.

According to the Government, its property involved here is the design and appearance of its obligations or securities. The use to which they are being put, communicating ideas of public concern, is not inconsistent with, or disruptive of, the "dedicated" use of currency as a medium of exchange. Indeed, since only distorted illustrations of the currency are used by Time, at most this property serves as a "model" for the illustrator or photographer, and there is no inconsistency with its purpose as currency other than an obvious concern with counterfeiting. In short, Time's use of the currency in no way affects "the governmental interest in preserving its 'property' for the use to which it was dedicated" (App. Br. 24 n.16).

Finally, the Government asserts that "like laws that regulate the use of the flag, Section 474 ¶ 6 may properly be viewed as simply restricting the uses to which the government's 'property' may be put" (App. Br. 23). Again, this statement ignores the constitutional limitations on such restrictions when they affect protected speech. Even where the national flag is involved, governments must adhere to these limitations.[27]

Nor is the regulation of our nation's flag analogous to the regulation of illustrations of currency. Reproductions of the national flag are flags themselves by act of Congress. 18 U.S.C.

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[27] Flag desecration statutes are not above constitutional suspicion. *See, e.g., Street v. New York; Spence v. Washington; see generally* Ely, *Flag Desecration: A Case study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975).

§ 700(b). Illustrations of currency that lack a capacity to deceive, however, are not actual currency and cannot be treated as if they were actual dollar bills for purposes of regulating their creation and use.

Certainly the Government may preserve the integrity of public property by preventing its physical destruction. For example, the First Amendment does not prohibit the Government from punishing those who would deface the Lincoln Memorial. *See Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring). However, a statute that, in the interest of protecting the Memorial's "integrity", prohibited the photographing of the Memorial or defacing of a plastic model of the Memorial, could not withstand consitutional scrutiny. That is the appropriate analogy to § 474 ¶ 6.

Thus, the assertion that the design of currency is government property does not add anything to the Government's efforts to advance an interest sufficient to support the statute. Section 474 ¶ 6 was correctly struck down by the district court as a constitutionally overbroad statute.

C. Title 18, U.S.C. § 504 Does Not Relieve the Constitutional Infirmity of § 474 ¶ 6 and Is also Independently Unconstitutional on its Face.

Since 1958, the ban on execution of "likenesses" of currency has been modified by § 504(1) to permit "illustrations" of paper money and other obligations and securities of the United States (and the preparation of plates therefor) only if the illustrations meet certain purpose, forum, color and size requirements. (*See* pp. 8-9 *supra*.)

The principles by which to test the lines drawn by § 504 are well-settled. Their application to the language of the statute demonstrates its glaring failure. The Government is fully aware of this, and has beat a hasty retreat from attempting to justify § 504(1) as drafted. It is not a valid time, place and manner regulation. Moreover, it is unconstitutionally vague. Certainly it cannot relieve the massive overbreadth of § 474 ¶ 6.

1. Section 504 cannot save §474 ¶ 6.

The combination of § 474 ¶ 6 and § 504(1) does not salvage the statutory scheme from Time's overbreadth challenge. The required nexus of governmental ends and statutory means which this Court has consistently required of police regulations intruding upon freedom of speech (*see* pp. 24-25 *supra*) cannot be satisfied by the arbitrary and eccentric statutory scheme governing publication of illustrations of currency. This point is most succinctly established by reference to this Court's decision in *Village of Schaumburg v. Citizens for a Better Environment*, which struck down a prohibition of door-to-door solicitation for charitable organizations which did not demonstrate that at least 75% of their receipts were directly used for charitable purposes. This Court agreed with the courts below that the issue in the case was "whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech", 444 U.S. at 633. Furthermore, the Court agreed that the 75% test was "a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect", *id.* at 636. Finding that the interests asserted by the Village were "indeed substantial" (protecting the public from fraud, crime and undue annoyance), but were "only peripherally promoted" by the 75% requirement, and "could be sufficiently served by measures less destructive of First Amendment interests," *id.*, the Court affirmed the summary judgment of facial overbreadth.

Like the *Schaumburg* ordinance, the arbitrary requirements for exemption set forth in § 504(1) cannot relieve the constitutional infirmity of § 474 ¶ 6. Section 504(1) simply perpetuates the ban on all pictures of currency which fail to satisfy a list of ill-considered requirements as to size, color, forum and purpose. Consideration of the kinds of illustrations which this statutory scheme condemns reveals that Congress has indiscriminately "lumped together" pictures that might pose a risk to public welfare with those that positively cannot, failing "to employ more precise measures to separate one kind from the other", as the Constitution requires. *See* 444 U.S. at 637.

Thus, Gale Wagner's oversized black and white artwork criticizing President Nixon was senselessly denied exemption under § 504(1) solely because it did not appear in an "article, book, journal, newspaper or album". Similarly, a black and white likeness of a fragment of currency—for example, the photograph of the center portrait of George Washington on a $1 bill which appeared, surrounded by a life preserver, as an inside illustration in TIME Magazine (J.A. 15)—is arbitrarily banned because that fragment appeared roughly true-to-size. By the same token, drastically off-size magazine illustrations of portions of money in any color (J.A. 13, 19, 21, 23, 39) are arbitrarily proscribed because they are not in black and white. In a word, there is no logical relationship, much less a substantial relationship, between the scope of the prohibitions imposed by these statutes and the protection of public safety: most of the illustrations condemned by these Federal laws are no more likely to threaten the public welfare through use in counterfeiting than those arbitrarily allowed.

The obvious deficiencies in the language and structure of the exemption in § 504 serve only to add additional insult to the principal constitutional injury caused by § 474 ¶ 6. For the reasons set forth above, Time submits that the wholesale legislative default embodied in this statutory scheme may no longer be permitted to persist in the penal code of the United States.

2. Section 504 creates an impermissible content-based standard for permitted speech.

It is axiomatic that "time, place and manner regulations must be 'applicable to all speech irrespective of content' ". *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 536 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. at 209); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516-17 (1981); *Heffron v. ISKCON*, 452 U.S. at 648. Government regulation in the interest of public safety or welfare which describes permissible speech in terms of subject matter " 'slip[s] from the neutrality of time, place, and circumstance

into a concern about content' [which is] never permitted". *Police Department v. Mosley,* 408 U.S. at 99 (quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 29); *see Consolidated Edison Co. v. Public Service Commission,* 447 U.S. at 536.

Section 504(1), limiting permitted illustrations of money to those serving "newsworthy", "historical" or "educational" purposes, self-evidently violates these principles. Whatever the words may mean to any given person at any particular time, the inquiry whether an illustration is "newsworthy" or "educational" can only be answered on the basis of a judgment about the content of its message. This judgment cannot be the Government's to make. *See Consolidated Edison Co. v. Public Service Commission,* 447 U.S. at 537-38 ("[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating . . . .' ").

3. Section 504 is also void for vagueness.

The requirements of § 504 are also impermissibly vague. The concept that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes", *Hynes v. Mayor of Oradell,* 425 U.S. at 620 (quoting *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939)), has long been recognized to carry special force when applied to a statute inhibiting expression. "[A] man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151 (1959), *quoted in Hynes,* 425 U.S. at 620; *see Cramp v. Board of Public Instruction,* 368 U.S. 278, 287 (1961).

In addition, the vagueness doctrine has the special office in the First Amendment context of minimizing the risk of arbitrary and discriminatory application of criminal statutes by law enforcement officials and triers of fact. *Smith v. Goguen,* 415 U.S. at 572-74; *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Indeed, this Court has recently recognized that:

> "the more important aspect of vagueness doctrine 'is . . . the requirement that a legislature establish minimal

> guidelines to govern law enforcement'. . . . [W]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections' ". *Kolender v. Lawson,* 103 S. Ct. 1855, 1858-59 (1983) (quoting *Smith v. Goguen,* 415 U.S. at 574-75).

Lack of narrow, objective standards in "time, place and manner" regulations gives law enforcement officials "effective power" to grant or deny permission to speak based upon arbitrary and subjective judgments, *Hynes v. Mayor of Oradell,* 425 U.S. at 622; such regulations are instruments for censorship and arbitrary suppression of expressive activity and are thus void on their face. *Cox v. Louisiana (Cox I),* 379 U.S. 536, 556-58 (1965); *Staub v. City of Baxley,* 355 U.S. 313, 322 (1958); *Cantwell v. Connecticut,* 310 U.S. at 305; *Schneider v. State,* 308 U.S. at 163; *Hague v. CIO,* 307 U.S. at 516; *Lovell v. City of Griffin,* 303 U.S. at 451.

The statutory limitation of permitted currency illustrations to pictures which serve unspecified "educational, historical, or newsworthy" purposes confers upon the Government unconstrained authority to determine the reasons for which the speech regulated by § 504 will be allowed. Without a legislative definition of these operative statutory words the risk of prosecution necessarily turns on the subjective definitions favored by the Secret Service and the Department of Justice, and the risk of conviction similarly turns on the subjective determinations of judges and juries as to the nature of educational, historical or newsworthy messages. *See Smith v. Goguen,* 415 U.S. at 575. Moreover, even the "forum" requirements suffer from vagueness, for as the district court put it, "[t]he definition of a journal, newspaper, or album is anyone's game to play". (J.A. 151).

The constitutional hazards of arbitrary enforcement have in fact been realized in the interpretations of § 504 by the agencies charged with its enforcement. While delivering complaints and warnings to Time, Secret Service agents and

Treasury Department officials conveyed substantially inconsistent instructions as to the nature of the pictures which Time may publish. In some cases, Time was warned that no color "likeness" of any portion of currency may appear in its magazines—regardless of the size or medium of the illustration—but that black and white "likenesses" are permissible so long as they conform to the size requirements set forth in § 504(1) and appear for a purpose approved by the statute. On another occasion, however, Time was instructed by the Assistant Legal Counsel of the Secret Service that photographs of any portion of currency are completely prohibited, regardless of size, color or purpose, because a photograph is not an "illustration" within the meaning of § 504(1). More recently, Time has been admonished that, in the view of the Treasury Department, (i) all representations of any currency are prohibited, regardless of size, color or medium of illustration, unless accompanied by "numismatic, educational, historical or newsworthy" information relating to the specific Federal Reserve Note pictured, and (ii) illustrations of money intended primarily for "decorative or eye-catching purposes" may not be used at all. (J. A. 33, 35, 49, 62.)

This last interpretation of the statute effectively obliterates the § 504(1) exemption. Under this view, one may publish only pictures of specific dollar bills that might by some quirk prove to be of public interest, and truly newsworthy stories about the role of money in our society may not be illustrated by means of the one image universally understood to represent their subject matter. Moreover, since the Treasury Department further maintained that, by definition, any "eye-catching" illustration cannot serve an "educational" or "newsworthy" purpose, virtually all magazine illustrations of currency were banned on this ground alone. Indeed, the very essence of a successful magazine illustration is its ability to grab a reader's attention by "catching eyes", and a prohibition on pictures intended for this purpose is in substance a proscription of illustrative communication itself.

While the Government now chooses to withdraw at least the most egregious of these interpretations of the statute (*see*

App. Br. 28 n.18), its concession in no way lessens the impact of the fact that such interpretations were once used. If the statutes are not struck down, the Treasury Department will remain free to formulate new restrictive interpretations.

Time submits that the Government's assurance that the statutory tests have not yet been used as vehicles for censorship of speech based on the speaker's point of view is not enough. The constitutional requirements are that a regulation constraining speech have a legitimate and substantial reason for existing, and that "time, place and manner" regulations be crafted so as to minimize the possibility of discretionary enforcement and arbitrary suppression.[28] (*See* cases cited pp. 36-37 *supra.*)

In sum, all "the vice[s] condemned in *Lovell, Schneider, Cantwell,* and *Staub*", *Hynes v. Mayor of Oradell,* 425 U.S. at 622, and their progeny have come to pass with § 504. The statute's ambiguous language has been arbitrarily and inconsistently interpreted, so that " 'men of common intelligence must necessarily guess at its meaning' ". *Cramp v. Board of Public Instruction,* 368 U.S. at 287 (quoting *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926)).

4. The Government's "narrowing construction" of § 504 does not cure its constitutional deficiencies.

In this Court, the Government attempts to save § 504 from invalidity by suggesting a "narrowing construction". While it is true that a court must attempt to construe a statute to avoid

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[28] The Government asserts that it could not individually review each illustration of currency a publisher might want to print for capacity to deceive the public, explaining that:

> "Not only would the burden of a case-by-case review impose an intolerable burden on the Secret Service, but requiring Government agents to decide in each instance whether a particular illustration has a 'capacity to deceive' (Mot. to Aff. 28) would run the risk of arbitrary and discriminatory enforcement based on the content of the message." (App. Br. 34 n.25)

No better words could describe the practice already engaged in by the Secret Service of pre-screening illustrations of currency to decide if they are of "educational, historical, or newsworthy" value (*see* J.A. 29-30, 31-32).

constitutional problems if fairly possible, it may not rewrite the statute wholesale, particularly a criminal statute. *Aptheker v. Secretary of State*, 378 U.S. at 515; *Blount v. Rizzi*, 400 U.S. 410, 419 (1971).

The Government, implicitly conceding that the Treasury Department's interpretations of § 504 have been unconstitutional (App. Br. 28 n.18), suggests that the limitation of illustrations of currency to "numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums" is "descriptive and illustrative, rather than prescriptive and mandatory" (*id.* 28). The Government now tells this Court that the purpose and forum requirements of § 504 are satisfied as long as the illustration appears in a "publication" (*id.*). This notion is completely unsupported by the statute's language and legislative history—indeed, until the Government's latest brief the Treasury Department did not support it either (*id.* 28 n.18).

Congress clearly was not willing to allow carte blanche to publications. Congress specifically adopted a limited number of permissible purposes for which illustrations could be used and a limited selection of permitted forums. The legislative record makes clear that Congress was tracking the policy of the Secretary of the Treasury in making "exceptions to the statute by granting special permission to use illustrations of [currency] for numismatic, historical, and educational purposes". S. Rep., *supra*, at 5; H.R. Rep. No. 1709, 85th Cong., 2d Sess. 3.

The Government's attempt to read out of the statute restrictions which it correctly perceives as a constitutional embarrassment is understandable. This Court, however, is not free to engage in such a wholesale revision. "[T]his Court [cannot] consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects." *Aptheker v. Secretary of State*, 378 U.S. at 515.

Even if the Government's new interpretation could be reconciled with the language and history of § 504, it would not

transform this content-oriented statute into a constitutional time, place and manner regulation of speech. Such regulations must be narrowly tailored to serve a significant governmental interest. *E.g., United States v. Grace*, 103 S. Ct. at 1707; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 535-36.[29] Section 504(1) as construed by the Government would still fail this test.

Notwithstanding the concededly significant interest in detecting and preventing counterfeiting, the Government has not even attempted to show how illustrations in publications (or the negatives from which they are made) are more or less likely to be used for counterfeiting purposes than other illustra-

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[29] The Government, rather than addressing the need for a sufficient "nexus between the distinctions among the various purposes and forums, on the one hand, and the statutory goal of preventing fraud and counterfeiting on the other" (App. Br. 26-27; *see* J.A. 150-51), instead argues that Time has no standing to raise this issue because it "would have no difficulty complying with a requirement that illustrations of currency must be in publications" (App. Br. 29). This contention is without merit. The Government's strategy here is to escape constitutional scrutiny of the "purpose" and "forum" requirements of § 504(1) by reading the "purpose" language out of the statute and then suggesting a construction which is still unconstitutional, but carves out an exception for publishers. But in suggesting a limiting construction, the Government must offer some showing that its new interpretation would be constitutional; otherwise one could always save an unconstitutional statute from attack by any particular plaintiff by reinterpreting the statute so as not to reach that plaintiff's particular conduct.

This strategy also flies in the face of traditional First Amendment overbreadth analysis, under which Time is permitted to challenge § 504 on behalf of those to whom the statute would be unconstitutionally applied. *See Kolender v. Lawson*, 103 S. Ct. at 1859 n.8; *New York v. Ferber*, 102 S. Ct. 3348, 3361 (1982); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. at 634; *Broadrick v. Oklahoma*, 413 U.S. 601, 612-16 (1973); *Thornhill v. Alabama*, 310 U.S. at 98. The Government acknowledges as much, but can only lamely reply that "appellee's challenge to the requirement of Section 504(1) that illustrations of currency must appear in publications does not rest on a claim that these provisions are overbroad" (App. Br. 29). We respectfully disagree. One of Time's major assertions has been and remains that § 504 continues § 474 ¶ 6's proscription of considerably more expression than is necessary to prevent counterfeiting.

tions. The appearance of a picture in a magazine as opposed to a placard has nothing to do with its utility to a counterfeiter. For example, Gale Wagner's 30-dollar bill is still outlawed by the statute under the proposed interpretation, even though it is of no conceivable use to a counterfeiter and is core First Amendment expression.

Moreover, this latest interpretation undercuts the Government's asserted justification that without the statutory scheme would-be counterfeiters would have an "instant" alibi by associating themselves with a legitimate printing operation (*see* App. Br. 21; J.S. 16-17 n.10). If illustrations are permitted as long as they appear in "publications", thereby expanding the exemption in § 504(1), the counterfeiter will now have a wider array of legitimate print shops from which to operate.[30]

Equally untenable is the Government's defense of § 504 in terms of the color requirement. Based on the factual record before it, the district court found that "the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency were of little value to someone attempting to counterfeit a hand-engraved, two-sided

[30] In addition, the Government's new interpretation attempts to escape overbreadth problems only with the result of exacerbating the statute's already existing problems of vagueness. *Winters v. New York*, 333 U.S. 507 (1948); *Smith v. Cahoon*, 283 U.S. 553, 564-65 (1931); *see generally* Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1, 17. Even though Time's activity of publishing a magazine would clearly qualify as "publication", other activities normally associated with First Amendment expression such as leaflets, posters, paintings, drawings and signs would not so clearly qualify. Time is permitted to attack § 504 as vague as applied to the conduct of other persons. *Kolender v. Lawson*, 103 S. Ct. at 1859 n.8. The Government's last-ditch effort does not define criminal conduct "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement". *Id.* at 1858. Moreover, Time itself should be able to engage in other activities related to its business without fear of prosecution, as for example, the creation of a one-page reprint of one of the *Time* covers at issue in this case or a pamphlet with a reprint of such a cover which questioned the soundness of the Government's expenditure of the taxpayers' money for prosecuting Time. Of course, neither of these could deceive the public or give aid to a counterfeiter, but it is unclear whether they are or are not "publications".

dollar bill" (J.A. 146 n.19, quoting Affidavit of Henry A. Grunwald, J.A. 76 ¶ 13). The Government now attempts to contest this factual finding by introducing evidence for the first time in this Court (*see, e.g.*, J.S. App. 40a-43a; App. Br. 21 n.15, 35 n.26).

The regulation prohibiting color illustrations is overbroad because it does not adequately focus on what is useful to a would-be counterfeiter. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. at 70; *NAACP v. Button*, 371 U.S. at 438. This is dramatically illustrated by the fact that Time's covers (J.A. 13, 19-23) violate the color restrictions, yet none of them has the remotest capacity for deception or could otherwise be used to make a counterfeit. The counterfeiter would do better to start with an actual piece of currency. It is simply fantastic to suggest that illustrations depicting a basketball net filled with $100 bills, folded oversized notes crammed in a diamond money clip, a cover size George Washington with a tear in his eye, or a "landscape" of enlarged and distorted $100 bills beneath open doors, are the raw materials of counterfeiters. A Federal prohibition of illustrations such as these serves no realistic government interest. It is simply an indefensible ban upon protected speech.

Recognizing the potential reach of the color regulation, the Government adopts an alternate strategy: It asserts that "the purpose of the color restriction is to prevent the making of multiple plates or negatives" (App. Br. 29-30). Permitting use of color illustrations, argues the Government, will justify possession of "separate plates and negatives of the note, Treasury seals and serial numbers"—"a crucial step towards counterfeiting obligations" (*id.* 30).[31] Even after this restate-

[31] This argument regarding the focus of § 504(1) was not made by the Government to the district court. It is certainly not supported by the legislative history. As the congressional reports indicate, the focus of this color prohibition was to prevent "the illustrations being used as an instrument of fraud" (App. Br. 8). Indeed, the Government asserts in its Brief that § 504(1) "reflects Congress's careful attempt to balance legitimate First Amendment concerns and legitimate law enforcement concerns by permitting reproduction of photographs of currency so long as certain reasonable conditions—***designed to protect against fraudulent use of these photographs*** —are satisfied" (***id.* 26, emphasis added**).

ment of focus, the statute reaches too far. Whatever the practices of professional counterfeiters might be, all of Time's four color separations of currency contain every obscuring feature and distortion of the ultimate picture, and thus are useless to the counterfeiter.[32]

If in fact the legislative end is raw materials and not the finished illustration, then the prohibition is overinclusive. Aiming for plates and negatives, the statutes ban the finished products as well, notwithstanding the availability of a less intrusive alternative: a careful regulatory system governing production and disposal of materials from which currency illustrations are made, coupled with penal sanctions for their abuse. That alternative is already in the statute in § 504(1)(iii) which requires destruction of plates and negatives used to create illustrations. The Government's only stated problem with that system is that it cannot get "guarantees" from every printer in the United States that they will comply with the destruction requirement (App. Br. 31-32). But it cannot be that the sole tests required to pass constitutional muster are expediency of detection and lack of guaranteed adherence to other existing laws. Indeed, under the existing statutory scheme the Government enforcement agencies must face the fact that they cannot guarantee that their staffs can monitor every publication in the United States for compliance with § 504(1).

Nevertheless, the Government argues that the ban on color is constitutional because Congress thought it was necessary to protect against counterfeiting. The Government claims that "[i]t is not the proper role of the courts to appraise the wisdom of Congress' judgment in this matter, so long as the statutory provision has a rational basis" (App. Br. 31). That argument ignores the principle that when First Amendment values are implicated, it is precisely the job of the courts to scrutinize legislative regulations to ensure that there is no unnecessary

[32] The Government takes the district court to task for relying upon what it calls "self-serving representations" by Time's affiants (App. Br. 30). The Government seems to forget that it offered no countervailing evidence even though it had the burden to justify the lines drawn by the statute.

curtailment of free expression. *United States v. Grace,* 103 S. Ct. at 1708-10; *Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. at 636-39; *NAACP v. Button,* 371 U.S. at 438; *Schneider v. State,* 308 U.S. at 161. Thus, even where a challenged regulation has restricted speech "incidently or only in a small number of cases", the Court has "recognized its obligation to assess the substantiality of the justification offered". *Schad v. Borough of Mt. Ephraim,* 452 U.S. at 69 & n.7.

The Government also believes that § 504(1) should survive challenge because: "Whatever thoughts or ideas appellee wishes to express by means of an illustration of currency can be expressed through a black and white illustration."[33] (App. Br. 32-33.) Yet in the absence of any clear demonstration of a compelling justification for a restriction of pictures to those printed in black and white, the Government is not permitted to dictate to Time what kind of expression is sufficient. It is wholly antithetical to the premises underlying the First Amendment to claim that the Government may impose a restriction on expression not because the restriction is narrowly tailored to serve an important governmental interest but because, in the Government's view, the expression is not "important" or "necessary" or can be made in some other manner. This Court has rejected that position. *Spence v. Washington,* 418 U.S. at 411 n.4. Under our system of government the Government is not in the business of dictating to its citizens the "best" manner to communicate their ideas or of deciding for them which types of communications are "important" or "trivial".

In any case, Time's use of color is not a mere "aesthetic preference". It is a reasoned journalistic judgment as to the most effective manner to communicate an idea and a considered business judgment as to how to compete with other magazines, all of which use color (*see* p. 2 n.3, *supra;* J.A. 77,

[33] This argument is essentially the same as the one made earlier in the Government's Brief to justify removing the symbol of money from discourse on the grounds that the same ideas could be expressed in other ways. It betrays a complete misunderstanding of First Amendment doctrine for the same reasons. (*See* pp. 22-23 *supra.*)

84, 91-92). For a company like Time, whose business depends on attracting readers and keeping them (and attracting advertising dollars because of its demonstrated success in this market), the decision to use color illustrations as opposed to black and white is hardly trivial or whimsical. Color is used by journalists because the forces of the market demand it—a market which includes the broadcast media. In short, not only is it effective communication to use color, it is necessary to ensure a magazine's economic viability.[34]

In its final argument, the Government asks whether it is powerless to stop a publisher from printing full size, full color representations of $100 bills, as long as there is no intent to deceive (App. Br. 34). The short answer is that this case does not involve such a statute or enforcement direction by the Treasury. Time is before this Court because pictures it does publish, which cannot conceivably be confused with genuine currency, are prohibited by Federal law, and, astoundingly, Time has actually been threatened with criminal prosecution for publishing them.

To describe the facts of this case is to realize that Congress can do a much better job in preventing counterfeiting than the present § 474 and § 504. It is not Time's task, but that of the elected representatives of this country, to fashion a better statute which would pass constitutional muster. However, to imply, as the Government seems to do, that a workable counterfeiting statute cannot be drafted which can distinguish between the oversized, distorted, one-sided representations appearing on the cover of TIME Magazine and a full-size, full-color representation of United States currency is preposterous.

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[34] It is, of course, no argument to respond that a ban on color would affect all magazine publishers alike, so that there would be no problems of competition as between publishers. For the color ban only limits publishers choosing to do cover stories which in some way involve money. Thus if a publisher chooses to do a cover story on the "shrinking dollar" one week, it will still have to compete with another publication's color cover concerning El Salvador. The result is that some publishers will simply not run a cover illustration of money. The effect is to discourage publishers from illustrating money at all in reporting stories.

5. The Government's severance argument is meritless.

The Government asserts that "[t]here can be no serious dispute that Section 474 ¶ 6 and 504(1) [sic] are severable," (App. Br. 35) and that "[i]f this Court concludes . . . that [§ 504(1)] cannot be saved by judicial construction, it should sever the two statutes and invalidate only Section 504(1), while leaving Section 474 ¶ 6 intact" (*id.*). It will hardly do to sever the unconstitutionally broad ban on protected speech in § 504(1) only to leave the broader ban imposed by § 474 ¶ 6, which is, if anything, even more riddled with constitutional infirmities. Both statutes are unconstitutionally overbroad, and both must be struck down.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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August 15, 1983

UNITED STATES CONSTITUTION

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATUTES

Title 18 U.S.C. § 474 (1976) provides:

"§ 474. Plates or stones for counterfeiting obligations or securities

". . . .

"Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States], or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States;

". . . .

"Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Title 18 U.S.C. § 504 (1976) provides:

"§ 504. Printing and filming of United States and foreign obligations and securities

"Notwithstanding any other provision of this chapter, the following are permitted:

> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term 'postage stamp' includes postage meter stamps."

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No. 82-729

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

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Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 4

Kovacs v. *Cooper*, 336 U.S. 77 ..... 3, 7

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Temple Baptist Church, Inc. v. *City of Albuquerque*, 646 P.2d 565 3

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Constitution and statutes:

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S. Rep. 2446, 85th Cong., 2d Sess. (1958) 4

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U.S. Postal Service, Domestic Mail Manual (1981) 3

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In our opening brief, we showed that the statutory scheme at issue does not bar the use of illustrations of currency for expressive purposes, but merely prohibits magazine publishers such as appellee from printing photographs of United States currency in color or in dimensions approximating the actual size of the currency depicted. Appellee and other publishers are free to print illustrations of currency that comply with these reasonable "time, place and manner" limitations, which Congress concluded were necessary to protect against counterfeiting. Accordingly, we argued that the statutory scheme is constitutional because it serves a concededly compelling governmental interest in a manner that does not significantly restrict First Amendment rights.

Appellee responds by contending, in essence, that the statutory scheme effects a massive infringement on its First Amendment rights, that Congress erred in concluding that the statutory restrictions were necessary to protect against counterfeiting, and that the statute is unconstitutional because Congress is capable of enacting legislation that is less restrictive of expressive activity and that would serve the anticounterfeiting purpose equally as well as the current statutory scheme. These contentions are without merit.

1. The central theme of appellee's response is that the statutory scheme is overbroad because it prohibits the publication of some photographs of currency that have no capacity to deceive and that therefore pose no counterfeiting threat. Appellee's overbreadth analysis, however, rests on a grossly distorted view of the First Amendment interests at stake in this case (see Time Br. 20-24). Appellee persists in its efforts to portray this case as one involving "government censorship" of the press (J.A. 93). See, *e.g.*, Time Br. 20 (describing the statutory scheme as "a law that purports to control the editorial content of [appellee's] magazines"); *id.* at 23 n.19 ("what the statutory scheme really amounts to is an abridgement of the rights of editors and publishers to exercise editorial control and judgment over the material they publish"); *id.* at 24 (referring to "the Government's total ban on the use of a particularly evocative symbol"); *id.* at 25 ("the statute directly and dramatically abridges the freedom to communicate").

Notwithstanding appellee's hyperbolic rhetoric, it bears repeating that the statutory scheme does not prevent the press from expressing any view on any subject, or from including any number of color illustrations in its magazines. Nor does the statutory scheme preclude the press from using illustrations of United States currency for expressive purposes, so long as the reasonable color and size requirements of 18 U.S.C. 504(1) are satisfied. So far as we are

aware, this Court has never held that such trivial sorts of regulations raise a substantial question of freedom of expression under the First Amendment. The restrictions at issue here are not materially different, in their impact on expression, from municipal ordinances that regulate the decibel level of loudspeakers, or the size and height of outdoor advertising signs, which this and other courts have concluded are permissible under the First Amendment as reasonable time, place and manner regulations. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Baldwin* v. *Redwood City*, 540 F.2d 1360, 1368-1369 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977); *Temple Baptist Church, Inc.* v. *City of Albuquerque*, 646 P.2d 565, 573 (N.M. 1982); *Krych* v. *Village of Burr Ridge*, 444 N.E. 2d 229, 232-233 (Ill. 1982).[1] Thus, appellee's "censorship" claim — which is critical to appellee's attack on the constitutionality of the statutory scheme — falls of its own weight.

2. What appellee really appears to be arguing is that, under the First Amendment, an editor's preference for publishing illustrations of currency in color, rather than in black and white, overrides Congress' considered judgment that the publication of color photographs of currency must be prohibited in order to protect against counterfeiting. In

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[1]The restrictions here are also akin to regulations placing size limitations on certain classes of mail (see U.S. Postal Service, *Domestic Mail Manual* § 352.1 (1981)), or to court rules imposing page and typeface limitations for briefs. See, *e.g.*, Sup. Ct. R. 33.1.(b) and 33.3. Yet, if this Court accepts appellee's claim that its First Amendment rights are significantly abridged by the color and size restrictions on reproductions of illustrations of currency, then presumably it will be open to litigants in future cases to assert that their First Amendment right to freedom of expression has similarly been abridged by decibel level statutes, billboard ordinances, postal regulations, or court rules that merely impose reasonable and seemingly innocuous restrictions on the manner in which a message may be conveyed.

support of this argument, appellee relies (Time Br. 42-43, 44-45) on the district court's finding that the materials used to prepare appellee's color illustrations of currency could not be used to counterfeit money. But, as we pointed out in our opening brief (at 30-31), even assuming the validity of this finding — which is based on the self-serving representations of appellee's own editors with respect to the particular illustrations involved in this case — the district court nonetheless erred in concluding that the statute is unconstitutional on its face.

In enacting Section 504(1), Congress noted that, historically, the Secretary of the Treasury had permitted the publication of illustrations of currency, but that, "[t]o prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money." S. Rep. 2446, 85th Cong., 2d Sess. 5 (1958); H.R. Rep. 1709, 85th Cong., 2d Sess. 3 (1958). Congress added that "[i]t is the opinion of the Treasury Department that the printing in publications of black-and-white illustrations of paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting." S. Rep. 2446, at 5-6; H.R. Rep. 1709, at 3. By adopting the color and size restrictions proposed by the Treasury Department, Congress effectively made a legislative finding that these restrictions are necessary to protect against counterfeiting. That legislative finding is entitled to a presumption of validity. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973); J. Sutherland, *Statutes and Statutory Construction* § 38.07, at 100 (C.D. Sands 4th ed. 1973).

Appellee's overstated assertions fail to overcome the presumption of validity that attaches to the congressional finding underlying the color and size restrictions in Section

504(1) and do not justify "exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). Even if the particular color illustrations of currency in appellee's magazines, and the materials used to produce them, could not be of use to a counterfeiter, it certainly does not follow that Congress erred in finding that the color and size restrictions are necessary to protect against counterfeiting. Appellee appears to concede as much by failing to respond to our contention that the restrictions in Section 504(1) are necessary to protect against the publication of full size, full color reproductions of United States currency (see Time Br. 46).

3. Appellee suggests, however, that the statute is unconstitutional because Congress could enact a narrower statute that would punish the publication of an illustration of currency that has a "capacity to deceive." But appellee fails to cite a single case in which this Court has struck down an otherwise valid time, place and manner restriction because the restriction was not the least intrusive means available to accomplish the legislative goal. Furthermore, as we pointed out in our opening brief (at 34 & n.25), the standard that appellee suggests would be difficult, if not impossible, to apply and would entail the additional danger of discriminatory enforcement based on the content of the message. Although it is not inconceivable that the anticounterfeiting interest served by the statute might be served by some other, less restrictive formulation, that possibility is not a sufficient basis for invalidating the statute, given the statute's insignificant impact on First Amendment rights.

In determining whether the statutory scheme unnecessarily restricts expression protected by the First Amendment, we submit that it is necessary to consider the extent to which that scheme actually impinges on First Amendment interests. In *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976), for

example, the Court rejected a First Amendment overbreadth challenge to a statute imposing a $1,000 limitation on political contributions by an individual to any single candidate per election. The parties challenging the statute argued that the $1,000 limitation was unrealistically low because a much larger contribution would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or office holder, especially in campaigns for statewide or national office. In rejecting this argument, the Court explained (424 U.S. at 30; footnote and citations omitted; emphasis added):

> While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, *Congress' failure to engage in such fine tuning does not invalidate the legislation.* As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Such distinctions in degree become significant only when they can be said to amount to differences in kind.*

Similarly, in *Baldwin* v. *Redwood City, supra,* the court held that city code provisions limiting the size of temporary signs and limiting the aggregate area of such signs that could be displayed on a single parcel of land do not offend the First Amendment. The court observed that "[n]either limitation significantly deters the exercise of First Amendment rights; they are comparable to the decibel restriction on sound trucks upheld in *Kovacs* v. *Cooper, supra.*" 540 F.2d at 1369. Although the court noted that the relationship of the restriction on aggregate sign area to the municipal interests it assertedly served was "attenuated and the unavailability of less restrictive alternatives questionable," the court nevertheless upheld the restriction because "the

burden imposed on free speech by this restriction is so minimal that generous allowance may be made for municipal preferences." *Ibid.*

Here, as we have shown, the *First Amendment* interest in publishing color, rather than black and white, illustrations of currency is quite minimal,[2] the color and size restrictions serve the concededly compelling governmental interest in protecting against counterfeiting, and the statute leaves open ample alternative channels of communication. In these circumstances, we submit that, because the lines drawn in the statute are reasonable, "Congress' failure to engage in [the] fine tuning [suggested by appellee] does not invalidate the legislation." *Buckley* v. *Valeo*, 424 U.S. at 30.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

REX E. LEE
Solicitor General

NOVEMBER 1983

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[2]We do not doubt that a newspaper publisher may have legitimate reasons for wishing to print a dollar bill in color rather than in black and white, but it trivializes the Constitution to suggest that those reasons give rise to a significant First Amendment interest.

No. 82-729-ADX
Status: GRANTED

Docketed:
October 27, 1982

Title: Donald T. Regan, Secretary of the Treasury, et al., Appellants
v.
Time, Inc.

Court: United States District Court for the Southern District of New York

Counsel for appellant: Solicitor General

Counsel for appellee: Gold, Stuart W.

Entry	Date	Note	Proceedings and Orders
1	Oct 27 1982	G	Statement as to jurisdiction filed.
2	Sep 2 1982		Application for an extension of time within which to docket an appeal and order granting same until October
3	Sep 2 1982		13, 1982 by Marshall, J., on September 13, 1982.
4	Oct 1 1982		Application for a further extension of time within which to docket an appeal and order further granting same
5	Oct 1 1982		until October 27, 1982 by Marshall, J., on October 4, 1982.
7	Nov 26 1982		Order extending time to file response to jurisdictional statement until January 10, 1983.
8	Jan 10 1983		Motion of appellee Time, Inc. to affirm filed.
9	Jan 12 1983		DISTRIBUTED. February 18, 1983
10	Feb 15 1983		DISTRIBUTED. February 18, 1983
11	Feb 15 1983	X	Reply brief of appellant filed.
12	Feb 22 1983		PROBABLE JURISDICTION NOTED.
			**********
14	Mar 28 1983		Order extending time to file brief of appellant on the merits until May 9, 1983.
15	May 6 1983		Order further extending time to file brief of appellant on the merits until May 23, 1983.
16	May 23 1983		Joint appendix filed.
17	Jun 1 1983		Brief of appellants Regan, Sec. Treas., et al. filed.
18	Jun 3 1983		Record filed.
19	Jun 3 1983		Certified original record on appeal received.
21	Jun 20 1983		Order extending time to file brief of appellee on the merits until August 4, 1983.
22	Jul 28 1983		Order further extending time to file brief of appellee on the merits until August 15, 1983.
23	Aug 18 1983		Brief of appellee Time, Inc. filed.
24	Aug 30 1983		CIRCULATED.
25	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 9, 1983. (3rd case) (1 hour)
26	Nov 1 1983	X	Reply brief of appellants Regan, Sec. Treas., et al. filed.
27	Nov 9 1983		ARGUED.